Supreme Court, U.S.
FILED
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No. 99-579

IN THE

Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

Petitioners,

v.

SALOMON SMITH BARNEY INC. and SALOMON BROTHERS REALTY CORP.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

Peter C. Hein
Counsel of Record
Andrew C. Houston
Michael A. Charish
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

William F. Conlon
Richard B. Kapnick
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Respondents

Robert A. Long, Jr.
Counsel of Record
John M. Vine
Michael R. Bergmann
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Charles C. Jackson
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Counsel for Petitioners

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 4, 1999
CERTIORARI GRANTED JANUARY 7, 2000

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Docket No. 92-CV-5883

HARRIS TRUST SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, AMERITECH CORPORATION, and JOHN A. EDWARDSON, PLAINTIFFS,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP., DEFENDANTS

DOCKET ENTRIES

9/1/92	1	COMPLAINT; jury demand. (Documents: 1-1 through 1-7) [Entry date 09/03/92]
10/20/92	12	MOTION by defendants to dismiss. [Entry date 10/21/92]
10/20/92	13	MEMORANDUM by defendant Salomon Brothers Inc, defendant – Salomon Brothers in support of motion to dismiss [12-1] [Entry date 10/21/92]
10/20/92	14	MINUTE ORDER of 10/20/92 by Hon. Marvin E. Aspen: Enter

		defendants' motion to dismiss [12-1] with memo in support. Plaintiffs to respond on or before 11/03/92. Defendants to reply by 11/13/92. The status hearing set for 10/20/92 is reset to 12/04/92 at 10:00 a.m. Mailed notice [Entry date 10/21/92]
11/12/92	27	MEMORANDUM by plaintiffs in opposition to defendants' motion to dismiss [12-1] [Entry date 11/16/92]
11/25/92	28	REPLY memorandum by defendant Salomon Brothers Inc, defendant Salomon Brothers in support of motion to dismiss defendants Salomon Bros Inc and Salomon Bros Realty Corp [12-1]. [Entry date 11/30/92]
12/24/92	29	MEMORANDUM, OPINION, AND ORDER [Entry date 12/28/92]
12/24/92	30	MINUTE ORDER of 12/24/92 by Hon. Marvin E. Aspen: Enter memorandum opinion and order: We grant defendants' motion to dismiss Counts II, IV, V, VI and VII of the complaint and deny their motion to dismiss Counts I, III, VIII, IX and X [12-1]. [Entry date 12/28/92]
2/12/93	37	MOTION by plaintiffs for leave to file the first amended complaint, instanter. [Entry date 02/16/93]

2/12/93	38	MINUTE ORDER of 2/12/93 by Hon. Marvin E. Aspen: Plaintiffs' motion for leave to file first amended complaint instanter [37-2] is granted. [Entry date 02/16/93]
2/12/93	39	FIRST AMENDED COMPLAINT [1-1] by plaintiffs; jury demand. [Entry date 02/16/93]
3/5/93	40	MOTION by plaintiffs for leave to file second amended complaint. [Entry date 03/09/93]
3/5/93	41	MINUTE ORDER of 3/5/93 by Hon. Marvin E. Aspen: Plaintiffs' motion for leave to file second amended complaint [40-1] is granted. [Entry date 03/09/93]
3/5/93	42	SECOND AMENDED COMPLAINT [39-1] by plaintiff Harris Trst Svgs Bk, plaintiff Ameritech Corp, plaintiff John A. Edwardson; jury demand. [Entry date 03/09/93]
4/6/93	45	ANSWER to Counts I, II and VIII through X of the second amended complaint and counterclaims against plaintiff Ameritech Corporation by defendant Salomon Brothers Inc, defendant Salomon Brothers [Entry date 04/07/93]

4/9/93	47	MOTION by defendants to dismiss Counts III, IV, V, VI, VII, XI and XII of the second amended complaint [Entry date 04/12/93]
4/9/93	48	MEMORANDUM by defendants in support of motion to dismiss counts III, IV, V, VI, VII, XI and XII of the second amended complaint [47-1] [Entry date 04/12/93]
5/5/93	53	MOTION by plaintiffs to dismiss defendants' counterclaims [Entry date 05/06/93]
5/5/93	54	MEMORANDUM by plaintiffs in support of motion to dismiss defendants' counterclaims [53-1] [Entry date 05/06/93]
5/5/93	55	RESPONSE by plaintiffs to defendants' motion to dismiss Counts III, IV, V, VI, VII, XI and XII of the second amended complaint [47-1] [Entry date 05/06/93]
6/8/93	57	REPLY memorandum by defendants in support of their motion to dismiss Counts III, IV, V, VI, VII, XI and XII of the second amended complaint [47-1] [Entry date 06/09/93]
6/21/93	58	REPLY memorandum by plaintiffs in support of their motion to dismiss

		defendants' counterclaims [53-1] [Entry date 06/22/93]
6/21/93	59	STATEMENT on Mertens v. Hewitt Associates and surreply by plaintiff to defendants' motion to dismiss Counts III, IV, V, VI, VII, XI and XII of the second amended complaint [47-1] [Entry date 06/22/93]
6/25/93	60	MOTION by plaintiffs for leave to fil[e] a statement on Mertens v. Hewitt Associates and surreply memorandum
6/25/93	61	MINUTE ORDER of 6/25/93 by Hon. Marvin E. Aspen: Granting plaintiffs' motion for leave to file a statement on Mertens v. Hewitt Associates and surreply memorandum [60-1]
8/16/93	68	MEMORANDUM OPINION AND ORDER [Entry date 08/17/93]
8/16/93	69	MINUTE ORDER of 8/16/93 by Hon. Marvin E. Aspen: Enter memorandum opinion and order: We grant Salomon's motion to dismiss Counts IV through VII, XI and XII, deny motion to dismiss Count III [47-1] and deny plaintiff's motion to dismiss defendants' counterclaims [53-1].

8/31/93	73	08/30/93 ANSWER to counts I, II, III and VIII through X of the second amended complaint [42-1] and COUNTERCLAIM by defendants against plaintiff Ameritech Corp. [Entry date 09/02/93]
9/24/93	74	ANSWER TO COUNTERCLAIM [73-2] and affirmative defenses by plaintiff Ameritech Corp; Notice of filing. [Entry date 09/28/93]
10/14/93	75	AMENDED ANSWER [74-1] and affirmative defenses to defendants' counterclaims by counter-defendant Ameritech Corp [Entry date 10/15/93]
1/18/94	83	CONSENT to proceed before a Magistrate Judge by plaintiffs and defendants. [Entry date 01/26/94]
1/24/94	84	REASSIGNMENT ORDER of 01/20/94: Case reassigned to Hon. Joan H. Lefkow from Hon. Marvin E. Aspen pursuant to local General Rule 2.41(d). (For further detail see order). [Entry date 01/26/94]
6/13/95	116	MOTION by plaintiffs for partial summary judgment [Entry date 06/14/95]
6/13/95	117	MEMORANDUM by plaintiffs in support of their motion for partial summary judgment [116-1] [Entry

		date 06/14/95]
6/13/95	118	MOTION by defendants for summary judgment on plaintiffs' federal claims [Entry date 06/14/95]
6/13/95	119	MEMORANDUM of law by defendant in support of motion for summary judgment on plaintiffs' federal claims [118-1] [Entry date 06/14/95]
6/13/95	121	STATEMENT of material facts as to which there is no genuine issue by plaintiffs [Entry date 06/14/95]
6/13/95	122	ALTERNATIVE MOTION by defendants for summary judgment on plaintiffs' state law claims [Entry date 06/14/95]
6/13/95	123	MEMORANDUM of law by defendants in support of alternative motion for summary judgment on plaintiffs' state law claims [122-1] [Entry date 06/14/95]
6/13/95	124	STATEMENT pursuant to Rule 12(m) of material facts as to which there is no genuine issue by defendants [Entry date 06/14/95]
7/18/95	130	CONSENT by defendants to plaintiffs' motion to defer briefing on defendants' motion as to plaintiffs' state law claims pending

		resolution of cross-motions for summary judgment on plaintiffs' federal claims [Entry date 07/19/95]
7/20/95	132	MOTION by plaintiffs Harris Trst Svgs Bk, Ameritech Corp to defer briefing on defendants' motion as to plaintiffs' state claims pending resolution of cross motions for summary judgment on plaintiffs' federal claims [Entry date 07/28/95]
7/20/95	133	MINUTE ORDER of 7/20/95 by Hon. Joan H. Lefkow: Granting plaintiffs' motion to defer briefing on defendants' motion as to plaintiffs' state claims pending resolution of cross for summary judgment on plaintiffs' federal claims [132-1] [Entry date 07/28/95]
9/27/95	136	MOTION by defendants Salomon Brothers Inc and Salomon Brothers Realty Corp. to strike affidavits of plaintiffs' proposed law professor "experts" [Entry date 10/04/95] [Edit date 10/04/95]
9/27/95	137	MEMORANDUM of law by defendants Salomon Brothers Inc and Salomon Brothers Realty Corp. in support of motion to strike affidavits of plaintiffs' proposed law professor "experts" [136-1] [Entry date 10/04/95]

9/27/95	138	BINDER OF MATERIALS filed by defendants Salomon Brothers Inc. and Salomon Brothers Realty Corp. cited in defendants' memorandum of law in support [137-1] of motion to strike plaintiffs' proposed law professor "experts" (1 vol.) [Entry date 10/04/95] [Edit date 10/04/95]
9/27/95	139	MEMORANDUM of law by defendants Salomon Brothers Inc and Salomon Brothers Realty Corp. in support of objections to evidentiary matters offered in plaintiffs' 12(M) statement [Entry date 10/04/95]
9/27/95	141	MEMORANDUM of law by defendants Salomon Brothers Inc and Salomon Brothers Realty Corp. in opposition to plaintiffs' motion for summary judgment [116-1]; [Entry date 10/04/95] [Edit date 10/04/95]
9/27/95	143	RULE 12(N) Statement by Salomon Brothers Inc and Salomon Brothers Realty Corp. in response to plaintiffs' 12(m) statement dated 05/12/95 (Volumes A through G, #143 through #143-7) [Entry date 10/04/95]
9/27/95	145	MEMORANDUM of law by plaintiffs in opposition to defendants' motion for summary

judgment [122-1] [118-1] [Entry date 10/04/95]

9/27/95 147 RULE 12(N) RESPONSE by plaintiffs to "defendants' statement pursuant to Rule 12(m) of material facts as to which there is no genuine issue" (1 vol.) [Entry date 10/04/95]

9/27/95 148 DECLARATION by Leonard S. Chaikind to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibit) (Attachment) [Entry date 10/04/95]

9/27/95 149 DECLARATION by Sean F. Hennessey to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) [Entry date 10/04/95]

9/27/95 150 DECLARATION by Charles S. Henry to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) [Entry date 10/04/95]

9/27/95 151 DECLARATION by J. Steven Manolis to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment [Entry date 10/04/95]

9/27/95 152 DECLARATION by James Richmond Jr. to accompany

Salomon's opposition [141-1] to plaintiffs' motion for summary judgment [Entry date 10/04/95]

9/27/95 153 DECLARATION by Henry B. Staley to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) [Entry date 10/04/95] [Edit date 10/04/95]

9/27/95 154 DECLARATION by [Gregory] A. White to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) [Entry date 10/04/95]

9/27/95 155 DECLARATION by Gary B. Hedges to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits). (1 vol.) [Entry date 10/04/95]

9/27/95 156 DECLARATION by Michael Bradley to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) (1 vol.) [Entry date 10/04/95]

10/25/95 159 OPPOSITION by plaintiffs to defendants' motion to strike evidence contained in plaintiffs' 07/11/95 12N response (Exhibits) [Entry date 11/01/95]

10/25/95	160	MEMORANDUM of law by plaintiffs in opposition to defendants' motion to strike affidavit testimony of Professors Joel Seligman and John C. Coffee, Jr. that the fee agreements are not securities [Entry date 11/01/95]
10/25/95	161	REPLY memorandum by plaintiffs in support of their motion for partial summary judgment [116-1] [Entry date 11/01/95]
10/25/95	162	12N REPLY by plaintiffs to Solomon's statement of additional facts which require the denial of plaintiffs' motion for summary judgment on plaintiffs' ERISA Claims", Part I [Entry date 11/01/95]
10/25/95	163	12N REPLY by plaintiffs to Solomon's statement of "additional facts which require the denial of plaintiffs' motion for summary judgment on plaintiffs' ERISA claims", Part II [Entry date 11/01/95]
10/25/95	165	SALOMON Errata to Salomon 12(M) statement dated 05/12/95 [Entry date 11/01/95]
10/25/95	166	SALOMON errata to Salomon 12N statement dated 07/11/95 [Entry date 11/01/95]

10/25/95	167	(1) OBJECTIONS to certain new materials referred to in plaintiffs' 12N reply to Salomon's 12N statement, and (2) responses to certain of plaintiffs' objections to Salomon's evidence by defendants' [Entry date 11/01/95]
10/25/95	168	REPLY memorandum by defendants in further support of objections to evidentiary matters offered in plaintiffs' 12(M) statement [Entry date 11/01/95]
10/25/95	169	REPLY memorandum by defendants in further support of motion to strike affidavits of plaintiffs' proposed law professor "experts" [136-1] [Entry date 11/01/95]
10/25/95	170	MEMORANDUM of law by defendants in support of motion to strike certain evidence relied upon in plaintiffs' 07/11/95 12N response [Entry date 11/01/95]
10/25/95	171	REPLY memorandum in further support of defendants' motion for summary judgment on plaintiffs' federal claims by defendants [Entry date 11/01/95]
10/25/95	173	COMPOSITE document which includes (1) defendants' 12(m) statement, (2) plaintiffs' 12N

responses thereto, and (3) defendants' objections to certain evidence contained in plaintiffs' 12N responses and replies to plaintiffs' 12N(3)(b) assertions by defendants [Entry date 11/01/95]

10/25/95 174 MOTION by defendants to strike certain evidence relied upon in plaintiffs' 07/11/95 12N response (Exhibits) [Entry date 11/01/95]

10/25/95 175 BINDER of legislative history and other materials submitted in support of Salomon's motion for summary judgment and in opposition to plaintiffs' motion for summary judgment by defendants (Exhibits) [Entry date 11/01/95]

10/25/95 176 COMPOSITE document which includes (1) defendants' 12(m) statement, (2) plaintiffs' 12N responses thereto, and (3) defendants' objections to certain evidence contained in plaintiffs' 12N responses and replies to plaintiffs' 12N(3)(b) assertions [Entry date 11/01/95]

11/1/95 178 ADDITIONAL MATERIALS filed by plaintiffs in support of plaintiffs' reply memorandum [161-1] in support of their motion for partial summary judgment and memoranda in opposition to defendants

evidentiary objections [167-1] (2 vols. #178-1 and #178-2) [Entry date 11/07/95] [Edit date 11/07/95]

11/6/95 179 OBJECTION by plaintiff Harris Trst Svgs Bk to defendants' surreply materials; Notice of filing [Entry date 11/08/95]

11/9/95 180 RESPONSE by defendants to plaintiffs' objection to defendants' (alleged) surreply materials [179-1]; Notice of filing [Entry date 11/15/95]

11/9/95 181 REPLY MEMORANDUM by defendants in further support of motion to strike certain evidence relied upon in plaintiffs' 07/11/95 12N response [174-1] [Entry date 11/15/95]

2/2/96 187 MEMORANDUM by defendants counter-claimants addressing cases supplementally submitted by plaintiffs on the parties' cross-motions for summary judgment [Entry date 02/05/96]

2/16/96 188 SUPPLEMENTAL MEMORANDUM IN RESPONSE by plaintiffs to defendants' memorandum of 01/26/96 [Entry date 02/21/96]

4/2/96 190 AMENDED ERRATA by

		defendants/counter-claimants to Salomon 12(M) statement dated 05/12/96 [143-1] [165-1] [Entry date 04/03/96]
4/2/96	191	AMENDED ERRATA by defendants/counter-claimants to Salomon 12(N) statement dated 07/11/95 [166-1] [Entry date 04/03/96]
4/2/96	192	DESCRIPTION by plaintiffs, defendants/counter-claimants and counter-defendant of joint compilation of testimony and documents (Exhibits); Joint notice of filing [Entry date 04/03/96]
4/17/96	193	BINDERS filed by defendants of key testimony and documents relating to Salomon 12(m) statement paragraphs 27 and 64 to 71 [124-1] (2 vols. #193-1 and #913-2)
6/13/96	194	MEMORANDUM DECISION [Entry date 06/18/96]
6/13/96	195	MINUTE ORDER of 6/13/96 by Hon. Joan H. Lefkow: Defendants' motion to strike affidavits of plaintiffs' proposed law professor "experts" [136-1] is granted. Defendants' motion to strike certain evidence relied upon in plaintiffs' 07/11/95 12N response [174-1] is denied as moot in light of the other

		rulings contained herein. Defendants' motion for summary judgment on plaintiffs' federal claims [118-1] is granted as to Counts I and III and as to any claims contained in Count II which are premised on an alleged breach of fiduciary duty. Plaintiffs' motion for partial summary judgment [116-1] is denied with respect to Count II of the second amended complaint and granted with respect to defendants' counterclaims for contribution. Enter memorandum decision. [Entry date 06/18/96]
7/22/96	196	MOTION by defendants to reconsider in light of 06/10/96 U.S. Supreme Court opinion in Lockheed Corp. v. Spink or, in the alternative, to amend this Court's order to certify the order for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) to permit review of two controlling legal issues (Exhibits); Amended notice of motion [Entry date 07/24/96]
7/22/96	197	MEMORANDUM by defendants in support of motion to reconsider in light of 06/10/96 U.S. Supreme Court opinion in Lockheed Corp. v. Spink [196-1] or, in the alternative, to amend this Court's order to certify the order for interlocutory appeal pursuant to 28 U.S.C. Section

1292(b) to permit review of two controlling legal issues [196-2] (Exhibit) [Entry date 07/24/96]

7/22/96 198 MOTION by defendants to modify this Court's decision to confirm that (unless otherwise expressly stated) statements of facts in the section of the decision entitled "Factual Background" or elsewhere in the decision constitute statements of the non-movant's evidence or reasonable inferences therefrom (Exhibit); Amended notice [Entry date 07/24/96]

7/22/96 199 MEMORANDUM by defendants in support of Salomon's motion to modify this Court's decision to confirm that (unless otherwise stated) statements of facts in the section of the decision entitled "Factual Background" or elsewhere in the decision constitute statements of the non-movant's evidence or reasonable inferences therefrom [198-1] [Entry date 07/24/96]

7/22/96 200 MINUTE ORDER of 7/22/96 by Hon. Joan H. Lefkow: Status hearing held and continued to 2:00 pm on 9/9/96. Salomon's motion to reconsider in light of 06/10/96 U.S. Supreme Court opinion in Lockheed Corp. v. Spink [196-1] or, in the alternative, to amend this Court's

order to certify the order for interlocutory appeal to 28 U.S.C. Section 1292(b) to permit review of two controlling legal issues [196-2] and Salomon's motion to modify this Court's decision to that (unless otherwise expressly stated) statements of fact in the section of the decision entitled "Factual Background" or elsewhere in the decision constitute statements of the non-movant's evidence or reasonable inferences therefrom [198-1] are entered and continued to 2:00 p.m. on 9/9/96. No notice (ar) [Entry date 07/24/96]

9/9/96 204 MEMORANDUM of law by plaintiffs in opposition to defendants' motion for interlocutory appeal [196-2] (Attachment). [Entry date 09/10/96]

9/9/96 202 [PROPOSED] ORDER modifying this Court's decision to confirm that statements of the facts in the decision constitute a statement of the non-moving party's evidence [Entry date 09/10/96]

9/9/96 203 MINUTE ORDER of 9/9/96 by Hon. Joan H. Lefkow: Status hearing held. Defendants' motion to modify this Court's decision to confirm that statements of the facts in the decision constitute a statement

of the non-moving party's evidence [198-1] is granted. Enter order. Plaintiffs' oral motion for leave to file memorandum in opposition to defendants' motion for interlocutory appeal [0-1] is granted. Defendants' oral motion to reply to the memorandum [0-1] is granted. Defendants to file reply on or before 09/18/96 [196-2]. Hearing and ruling on the motion for interlocutory appeal is set for 9:45 a.m. on 9/26/96 [196-1]. [Entry date 09/10/96]

9/18/96 205 REPLY MEMORANDUM by defendants in further support of Salomon's motion to reconsider in light of 06/10/96 U S. Supreme Court opinion in Lockheed Corp. v. Spink [196-1], or in the alternative, to amend this Court's order to certify the order for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) to permit review of two controlling legal issues [196-2] (Exhibits) [Entry date 09/20/96] [Edit date 09/20/96]

9/24/96 206 ORDER on motion to reconsider [196-1] or to certify for immediate appeal [196-2] [Entry date 09/26/96]

9/24/96 207 MINUTE ORDER of 9/24/96 by Hon. Joan H. Lefkow: It is hereby ordered that defendant's motion for

reconsideration of this court's decision and order of 06/13/96 [196-1] or, in the alternative, to amend the court's order so as to certify it for interlocutory appeal [196-2] is denied in its entirety. Plaintiffs are further ordered to file their response to Salomon's alternative motion for summary judgment on plaintiffs' state law claims [122-1] on or before 10/25/96 and defendant shall file thereto on or before 11/8/96 [122-1]. Enter ruling on to reconsider or certify for immediate appeal. [Entry date 09/26/96] [Edit date 09/27/96]

11/19/96 210 MEMORANDUM of law by defendants in further support of motion for summary judgment on plaintiffs' state law claims [122-1]; Notice of filing [Entry date 11/21/96]

12/20/96 216 SURREPLY by Harris Trst Svgs Bk and Ameritech Corp to defendants' alternative motion for summary judgment on plaintiffs' state law claims [122-1]. [Entry date 12/26/96] [Edit date 12/26/96]

12/23/96 218 MEMORANDUM by defendants bringing to the Court's attention a recent change in the statutory language of the consumer Fraud Act; Notice of filing [Entry date 12/26/96] [Edit date 12/26/96]

6/5/97	--	EXECUTIVE committee order of 06/05/97 Case reassigned to Hon. Ian H. Levin from Hon. Joan Humphrey Lefkow pursuant to consent [Entry date 06/09/97]
7/10/97	222	MOTION by plaintiffs to retain referral of proceedings to Magistrate Judge Joan Lefkow (Exhibits); Notice of motion [Entry date 07/23/97]
7/15/97	223	MINUTE ORDER of 7/15/97 by Hon. Marvin E. Aspen: Plaintiffs' motion to retain referral of proceedings to Magistrate Judge Joan Lefkow is granted. [222-1] [Entry date 07/23/97]
7/23/97	224	MINUTE ORDER of 7/23/97 by Hon. Marvin E. Aspen: The Court having granted plaintiffs' motion to retain reassignment to the calendar of Magistrate Judge Lefkow, it is hereby ordered that the reassignment of this case, Harris Trust v. Salomon Brothers, et al., number 92 C 5883, be removed from the calendar of Magistrate Judge Levin, and that it be reassigned and returned to the calendar of Magistrate Judge Lefkow in the interest of judicial efficiency. [Entry date 07/28/97]
9/30/97	225	MEMORANDUM decision [122-1]

9/30/97	226	MINUTE ORDER of 9/30/97 by Hon. Joan H. Lefkow: Defendants' alternative motion for summary judgment on plaintiffs' state law claims [122-1] is granted with respect to counts VIII - X of the second amended complaint. Enter memorandum decision.
10/20/97	227	RENEWED MOTION by defendants to amend the Court's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b) to permit review of two controlling legal issues (Exhibits) [Entry date 10/21/97]
10/20/97	--	EXECUTIVE committee order of 10/20/97: Case reassigned to Hon. Ronald A. Guzman. [Entry date 10/21/97]
11/5/97	229	JOINT MOTION by plaintiffs, defendants to reassign (Exhibits) [Entry date 11/18/97]
11/7/97	230	MINUTE ORDER of 11/7/97 by Hon. Marvin E. Aspen: Joint motion to reassigned is granted. [229-1] [Entry date 11/18/97]
11/21/97	231	REASSIGNMENT ORDER of 11/17/97: Case reassigned to Hon. Judge Warren K. Urbom from Magistrate Judge Ronald A.

		Guzman pursuant to local General Rule 2.30(e). (For further detail see order.) [Entry date 11/24/97]
11/24/97	232	RENEWED MOTION by defendants (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b), or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order (Exhibits) (Exhibit) [Entry date 11/25/97]
11/24/97	233	MEMORANDUM by defendants in support of renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b) [232-1], or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order [232-2] [Entry date 11/25/97]
11/24/97	234	APPENDIX filed by defendants to accompany memorandum [233-1] (2 Vols.: 234-1 and 234-2) [Entry date 11/25/97]
12/12/97	235	MEMORANDUM by plaintiff Harris Trst Svgs Bk of law in opposition to defendants' renewed motion for interlocutory appeal [232-1], [232-2] (Exhibits)

12/22/97	236	REPLY by defendants memorandum in further support of Salomon's renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b) or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order [233-1] [Entry date 12/23/97]
1/7/98	237	MEMORANDUM AND ORDER on defendants' renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b), or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order [Entry date 01/15/98]
1/7/98	238	MINUTE ORDER of 1/7/98 by Hon. Warren K. Urbom: Enter Memorandum and Order: Defendants' renewed motion to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal [227-1], [232-1], [232-2] [Entry date 01/15/98]
3/31/98	239	CERTIFIED copy of Order from the 7th Circuit. It is ordered that #1, Salomon's petition for permission to appeal pursuant to 28 U.S.C. 1292(b), filed on 1/16/98, by the petitioners is granted. Appellant is

		directed to tender the docketing fee to the clerk of the District Court no later than 4/1/98. [Entry date 04/01/98]
4/1/98	--	TRANSMITTED to the 7th Circuit the short record on appeal. Mailed notice to all counsel.
4/7/98	241	ACKNOWLEDGEMENT of receipt of short record on appeal USCA 98-1812 (Attachment)
4/10/98	242	DESIGNATION by Salomon Brothers, Salomon Brothers Inc of appeal record no. 98-8002 [Entry date 04/13/98]
4/15/98	243	EXHIBITS by defendants Salomon Brothers and Salomon Brothers Inc (3bxs. 243-1 through 243-3). [Entry date 04/16/98]
4/17/98	--	TRANSMITTED to the 7th Circuit the long record on appeal no. 98-1812 consisting four volumes of pleadings, five volumes of exhibits, four volumes of transcripts, fifteen volumes of loose pleadings and certificate re appeal.
6/26/98	244	PROPOSED ORDER granting request to re-furnish record materials (Exhibit) [Entry date 06/29/98]
6/26/98	245	MINUTE ORDER of 6/26/98 by

		Hon. Marvin E. Aspen: Enter order: to insure the completeness of the record on appeal. It is hereby ordered that defendants are granted permission to refurnish the following record materials, which may not be readily locatable in the Court's files: 1) 3 boxes of publicly filed deposition testimony and exhibit excerpts. 2) Declaration by Donald C. Langevoort dated 6/19/95, and the exhibit thereto, originally filed on or before 9/27/95. The Clerk of the Court shall transmit these to the U.S. Court of Appeals for the 7th Circuit. [Entry date 06/29/98]
6/30/98	--	TRANSMITTED to the 7th Circuit supplement to appeal no. 98-1812 consisting of document numbers 244 and 245 and certified copy of docket sheet.
7/21/98	246	ONE LARGE BROWN BOX by defendants of copies of loose pleadings (15 Vols.: 246-1 through 246-15)
7/22/98	--	TRANSMITTED to the 7th Circuit supplement to appeal no. 98-1812 consisting of certified copy of docket sheet, copy of Judge Aspen's order dated 6/26/98, document number 245 and one large brown box by defendants, document

number 246.

7/24/98 -- TRANSMITTED to the 7th Circuit supplement to appeal no. 98-1812 consisting of certified copy of docket sheet, Copy of Judge Aspen's order dated 6/26/98, doc. No. #245 and one large brown box by defendants of copies of loose pleadings (15 Vols.: 246-1 through 246-15.)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Docket Nos. 98-1812, 98-8002

HARRIS TRUST SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, AMERITECH CORPORATION, and JOHN A. EDWARDSON, PLAINTIFFS-APPELLEES,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP., DEFENDANTS-APPELLANTS

DOCKET ENTRIES

1/16/98 Petition for Permission to appeal pursuant to 28 U.S.C. 1292(b) docketed (D.C. no. 92 C 5883) [98-8002] [1025028-1]

1/22/98 ORDER: Filed clerk's notice to Respondent Harris Trust Savings, Respondent Ameritech Corp, Respondent John A. Edwardson to file a response to "SALOMON'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. SECTION 1292(b)", filed on 1/16/98, by counsel for the petitioners. [1025021-1] MAF [98-

8002]

2/5/98 Filed Respondent Harris Trust Savings, Respondent Ameritech Corp opposition to Petitioner Salomon Brothers, In, Petitioner Salomon Brothers Rea motion Salomon's petition for permission to appeal. [98-8002] [1025021-1]

2/5/98 Filed Respondent Harris Trust Savings, Respondent Ameritech Corp, Respondent John A. Edwardson opposition to Petitioner Salomon Brothers, In, Petitioner Salomon Brothers Rea motion Salomon's petition for permission to appeal pursuant to 28 U.S.C. 1292(b). [98-8002] [1039323-1]

3/26/98 ORDER issued GRANTING the petition for permission to appeal pursuant to 28 U.S.C. 1292(b). NM [98-8002]

4/1/98 Case transferred from Miscellaneous Docket No. 98-8002 [98-1812] [1025021-1]

4/1/98 Private civil case docketed. (98-1812) [1048424-1]

4/1/98 [98-1812] ROA from No. Dist. of IL., E. Div. due 4/9/98.

4/2/98 Filed Petitioner Salomon Brothers,

In, Petitioner Salomon Brothers Rea docketing statement. [98-8002] [1048493-1]

4/17/98 Original record on appeal filed. Contents of record: 4 vol. pleadings; 4 vol. transcripts; 15 vol. loose pleadings, 5 vol. & 3 boxes exhibits; 14 sealed envelopes. [98-1812] [1054385-1]

4/28/98 Filed oversized record in Section #16 of exhibit room: 2 boxes containing 4 vol. pleadings; 15 vol. loose pleadings; 4 vol. transcripts; 5 vol. & 3 boxes exhibits. [1048424-1] [98-1812]

7/1/98 Supplemental record on appeal filed. Contents of record: 1 vol. pleadings. [98-1812] [1076875-1]

7/24/98 Supplemental record on appeal filed. Contents of record: 15 vol. loose pleadings (contained in one large brown box). [98-1812] [1083973-1]

7/27/98 Filed oversized record in Section #18 of exhibit room: 1 box containing 15 vol. Loose pleadings. [1048424-1] [98-1812]

8/5/98 Filed 15c appellant's brief by Salomon Brothers, In, Salomon Brothers Rea. Disk filed. [98-1812] [1087970-1] (patb)

8/5/98	Filed 10c appendix by Appellant Salomon Brothers, In, Appellant Salomon Brothers Rea. [98-1812] [1087974-1]
8/10/98	Filed oversized record in Section # 18 of exhibit room: 1 box containing appendix (8/5). [1048424-1] [98-1812]
9/24/98	Filed 15c appellee's brief by Harris Trust Savings, Ameritech Corp. [98-1812] [1103299-1]
9/24/98	Filed 10c appendix by Appellee Harris Trust Savings. Appellee Ameritech Corp. (98-1812] [1103306-1]
10/9/98	ORDER issued GRANTING motion to file appellees' brief responsive brief under seal. [1103525-1] The clerk of this court is directed to file instanter the tendered copies of the appellees' brief under seal. [1103525-1] LAH [98-1812]
10/9/98	Filed 15c appellee's brief by Harris Trust Savings. Ameritech Corp. per order. (Under Seal). [98-1812] [1108980-1]
10/16/98	Filed oversized record in Section #16 of exhibit room: 1 box containing appendix (9/24).

	[10484240-1] [98-1812]
10/19/98	Filed 15c appellant's reply brief by Salomon Brothers, In, Salomon Brothers Rea. [98-1812] [1111044-1]
10/30/98	Filed oversized record in Section # 16 of exhibit room: 1 box containing reply brief & appendix (10/19). [1048424-1] [98-1812]
11/30/98	Case heard and taken under advisement by panel: Circuit Judge Joel M. Flaum, Circuit Judge Michael S. Kanne, Circuit Judge Terence T. Evans. [98-1812] [1123716-1]
11/30/98	Case argued by Charles C. Jackson for Appellee John A. Edwardson, Appellee Ameritech Corp., Appellee Harris Trust Savings, Peter C. Hein for Appellant Salomon Brothers Rea. Appellant Salomon Brothers, In. [98-1812] [1048424-1]
12/4/98	Filed Appellee Harris Trust Savings, Appellee Ameritech Corp. Citation of Additional Authority, per CR 28(e). Dist. [98-1812] [1125731-1]
12/14/98	Filed Appellant Salomon Brothers, In, Appellant Salomon Brothers Rea Citation of Additional Authority, per CR 28(e). Dist. [98-1812]

[1128567-1]

1/28/99	Filed Appellant Salomon Brothers, In, Appellant Salomon Brothers Rea Citation of Additional Authority, per CR 28(e). Dist. [98-1812] [1142325-1]
2/4/99	Filed Appellee Harris Trust Savings, Appellee Ameritech Corp., Appellee John A. Edwardson Citation of Additional Authority, per CR 28(e). Dist. [98-1812] [1145168-1]
7/6/99	Filed opinion of the court by Judge Evans. REVERSED and summary judgment is granted to Salomon Brothers. Circuit Judge Joel M. Flaum, Circuit Judge Michael S. Kanne, Circuit Judge Terence T. Evans. [98-1812] [1048424-1] Because this opinion creates a circuit split, it has been circulated among all judges of the court in regular active service as required by Seventh Circuit Rule 40(e). Judge Coffey did not participate in the circulation due to a conflict. All other judges voted not to rehear the case en banc except Judge Ripple who voted to grant rehearing en banc.
7/6/99	ORDER: Final judgment filed per opinion. With costs: y. [98-1812] [1194504-1]

7/26/99	Filed motion by Appellee Harris Trust Savings, Appellee Ameritech Corp. Appellee John A. Edwardson to stay the mandate. [1200794-1] [98-1812]
8/2/99	ORDER issued GRANTING motion to stay the mandate. Counsel for appellees is reminded of its obligation under Fed. R. App. P. 41 (d)(2)(B). [1200794-1] LH [98-1812]
10/13/99	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 99-579. [98-1812] [1224184-1]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Plaintiffs' Second Amended Complaint in Harris Trust v. Salomon Brothers, dated March 3, 1993

(R. 42) (Sal. C.A. App. 292-307, at 295-97, 300-06) (Excerpts)

PARTIES

6. Harris Trust and Savings Bank is a directed trustee of APT and a fiduciary of the Ameritech pension plans funded through APT within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Harris Trust executed, on behalf of APT, each of four assignments by Salomon to APT of 95% to 100% of Salomon's interests in the MOA and Best Fee Agreements. See Complaint Exhibits A, B, C & D (Fee Agreements 1 through 4, with Assignments).

7. Ameritech is an employer within the meaning of ERISA § 3(5), 29 U.S.C. § 1002(5); a fiduciary of the Ameritech Pension Plan, the Ameritech Management Pension Plan, and APT within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); and the plan sponsor of the Ameritech Pension Plan and Ameritech Management Pension Plan (collectively the "Plan") within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). There are more than 115,000 active and retired participants in the Plan, which is an "employee benefit plan" within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3). The Plan is subject to the coverage of ERISA pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a).

* * *

11. For the reasons set forth at ¶¶ 13-18, 21, 22, 26-29, 32, 33, 36, 38, 40, 42, 44-46 and 51, Salomon is a fiduciary

to the Plan, and a "party in interest" within the meaning of ERISA §§ 3(14)(A) & (B), (21)(A), 29 U.S.C. §§ 1002(14)(A)&(B), (21)(A).

FACTS

Background

12. Ameritech's Asset Management Committee had/has general authority for managing assets of the Plan and appointing investment managers to manage those assets. For the periods pertinent to Fee Agreements 1-4, Ameritech appointed National Investment Services of America, Inc. ("NISA"), whose principal place of business is in respect to a segment of APT -- the Dedicated Portfolio. With respect to these investments, NISA was both an "investment manager" and a "fiduciary" as those terms are used in ERISA Sections 3(38) and (21)(A), 29 U.S.C. §§ 1002(38), (21)(A). NISA was also a registered investment advisor under the Investment Advisors Act of 1940.

* * *

COUNT I

Breach Of ERISA Fiduciary Duty

63. This Count I is brought under ERISA Sections 404, 409 and 502, 29 U.S.C. §§ 1104, 1109 and 1132, for breach of fiduciary duties by Salomon.

64. Plaintiffs reallege and incorporate by this reference Paragraphs 1 through 62 above as Paragraph 64 of this Count I as though fully stated herein.

65. Salomon's misconduct complained of in Paragraph 64 violated ERISA's fiduciary duty rules, which apply to Salomon with respect to investment advice rendered by it in

connection with the purchases by APT of Fee Agreements 1-4, and with respect to its discretionary authority or control in managing or disposing of plan assets.

66. Salomon breached its fiduciary duties, failing to discharge them solely in the interest of participants and beneficiaries of the Plan, by:

(a) failing, when advising APT to purchase Salomon's interests, to fully, accurately, truthfully and prudently disclose investment risk and other information relating to Fee Agreements 1 through 4;

(b) failing, after the purchase by APT of Salomon's interests, to accurately, truthfully and prudently scrutinize, monitor and report the financial performance of Fee Agreements 1 and 2;

(c) advising APT to invest in Fee Agreement 3 when Salomon knew that Fee Agreements 1 and 2 would not perform to projections and that Portfolio III, upon which Fee Agreement 3 was based, would not perform as Salomon was representing;

(d) failing, after the purchase by APT of Salomon's interests, to accurately, truthfully and prudently scrutinize, monitor and report financial performance of Fee Agreement 3;

(e) advising APT to invest in Fee Agreement 4 when Salomon knew that Fee Agreements 1 and 2 would not perform to projections; and

(f) failing, after the purchase by Ameritech of Salomon's interests, to accurately, truthfully and prudently scrutinize, monitor and report financial performance of Portfolio 4.

67. As direct consequences of Salomon's affirmative misconduct, APT did not learn of the deteriorating performance of Fee Agreements 1 and 2; was induced and lulled into purchasing Fee Agreements 3 and 4; was prevented from learning certain material information concealed by Salomon with the intent to induce APT's purchases; and was damaged in that the worthless interests in Fee Agreements 3 and 4 would not have been purchased by APT had Salomon conducted itself prudently and truthfully. Salomon's failures to disclose constitute fraudulent concealment of Salomon's violation of ERISA Section 404.

WHEREFORE, Plaintiffs pray for relief as follows:

1. That a judgment be entered against Salomon and in favor of Plaintiffs and payable to APT in the amount of the purchase price of Fee Agreements 1 through 4, plus appropriate prejudgment interest or repayment of income derived from principal, whichever is greater;

2. That Salomon also be required to disgorge to APT all profits made through the use of the Plan's assets by Salomon; and

3. That Plaintiffs be awarded such other and further relief and redress, as this Court deems just and equitable, including costs, post-judgment interest or repayment of income derived from principal, whichever is greater, and attorneys' fees.

COUNT II

ERISA Prohibited Transactions

68. This Count II is brought under ERISA Sections 406, 409 and 502, 29 U.S.C. §§ 1106, 1109 and 1132, to seek

relief from Salomon's prohibited transactions with respect to the Plan.

69. Plaintiffs reallege and incorporate by this reference Paragraphs 1 through 67 above as Paragraph 69 of this Count II as though fully stated herein.

70. Salomon caused the Plan to engage in and/or to participate in transactions prohibited by Section 406 of ERISA, 29 U.S.C. § 1106, by:

(a) failing to make full disclosure of investment information;

(b) selling property to the Plan of a type and in a manner for which no exemption is available, in violation of ERISA Section 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A);

(c) furnishing services to the Plan for excessive compensation, in violation of ERISA Sections 406(a)(1)(C) and 408(b)(2), 29 U.S.C. §§ 1106(a)(1)(C) and 1108(b)(2);

(d) transferring Plan assets to, and using Plan assets for the benefit of, a party in interest in violation of ERISA Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D);

(e) dealing with Plan assets in its own interest and for its own account, in violation of ERISA Section 406(b)(1), 29 U.S.C. § 1106(b)(1); and

(f) acting on its own behalf in transactions in which Salomon's interests were adverse to the Plan, in violation of ERISA Section 406(b)(2), 29 U.S.C. § 1106(b)(2).

71. On April 8, 1991, Ameritech filed with the Internal Revenue Service amended Forms 5500 for Plan years 1987,

1988 and 1989. The filing reported apparent prohibited transactions involving the APT investments in Fee Agreements 1, 2, 3 and 4.

72. As direct consequences of Salomon's affirmative misconduct, APT was induced and lulled into purchasing Fee Agreements 3 and 4; was prevented from learning certain material information concealed by Salomon with the intent to induce APT's purchases; and was damaged in that the worthless interests in the Fee Agreements would not have been purchased by APT had Salomon conducted itself prudently and truthfully. Salomon's failures to disclose constitute fraudulent concealment of Salomon's violations of ERISA Sections 406 and 408, 29 U.S.C. §§ 1106, 1108.

WHEREFORE, Plaintiffs pray for relief as follows:

1. That a judgment be entered against Salomon requiring it to undo the prohibited transactions and place the Plan in the position it would have occupied had the prohibited transactions not occurred;

2. That a judgment be entered against Salomon in favor of Plaintiffs and payable to APT in the amount of the purchase price of Fee Agreements 1, 2, 3 and 4, with appropriate prejudgment interest or repayment of income derived from principal, whichever is greater;

3. That Salomon be required to disgorge to APT all profits made through the use of the Plan's assets by Salomon; and

4. That Plaintiffs be awarded such other and further relief and redress, as this Court deems just and equitable, including damages equal to any excise taxes, penalties and interest assessed against APT or Plaintiffs, costs, post-judgment interest, or repayment of income

derived from principal, whichever is greater, and attorneys' fees.

COUNT III

Knowing Participant Liability

73. This Count III is brought under federal common law and ERISA Sections 404, 409, and 502, 29 U.S.C. §§ 1104, 1109, and 1132, to impose liability on Salomon as a knowing participant in fiduciary violations.

74. Plaintiffs reallege and incorporate by this reference paragraphs 1 through 72 above as paragraph 74 of this Count III as though fully stated herein.

75. APT's purchase of interests in Fee Agreements 1 through 4 were made by NISA, the investment manager of APT's Dedicated Bond Portfolio and an ERISA fiduciary. NISA held all of the Fee Agreements for, or placed them into, the Dedicated Bond Portfolio.

76. NISA's purchases of interests in Fee Agreements 1 through 4 from Salomon were prohibited transactions under ERISA Section 406, 29 U.S.C. § 1106, for which no exemption was available. See PTE 75-1, 40 Fed. Reg. 50845. Salomon knowingly participated in NISA's fiduciary breaches by selling interests in Fee Agreements 1 through 4 to NISA for APT's Dedicated Bond Portfolio. In addition, at least as to Fee Agreements 3 and 4, Salomon induced the purchase of interests in those Agreements by trickery, with full knowledge that they were worthless, near to or in default, or at a minimum, had a value far less than represented.

77. As direct consequences of Salomon's affirmative misconduct, APT did not learn of the deteriorating performance of Fee Agreements 1 and 2; was induced and lulled into purchasing Fee Agreements 3 and 4; was prevented from learning certain material information

concealed by Salomon with the intent to induce APT's purchases; and was damaged in that the worthless interests in the Fee Agreements would not have been purchased by APT had Salomon conducted itself prudently and truthfully. Salomon's failures to disclose constitute fraudulent concealment of Salomon's violations of ERISA Sections 406 and 408, 29 U.S.C. §§ 1106, 1108.

WHEREFORE, Plaintiffs pray for relief as follows:

1. That a judgment be entered against Salomon requiring it to undo the prohibited transactions and place the Plan in the position it would have occupied had the prohibited transactions not occurred;

2. That a judgment be entered against Salomon and in favor of Plaintiffs and payable to APT in the amount of the purchase price of Fee Agreements 1, 2, 3 and 4, with appropriate prejudgment interest or repayment of income derived from principal, whichever is greater;

3. That Salomon be required to disgorge to APT all profits made through the use of the Plan's assets by Salomon; and

4. That Plaintiffs be awarded such other and further relief and redress, as this Court deems just and equitable, including damages equal to any excise taxes, penalties and interest assessed against APT or Plaintiffs, costs, post-judgment interest, or repayment of income derived from principal, whichever is greater, and attorneys' fees.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Declaration of Charles S. Henry, Director in Salomon's Real Estate Department, dated June 16, 1995

(R. 150) (Excerpts)

1. From March 1985 to September 1990 I was employed by Salomon Brothers Inc, and I served as the head of an informal hotel group in Salomon's real estate finance area. In this capacity, I participated in Salomon's work related to the financing of Motels of America Portfolio I, MOA Portfolio II, MOA Portfolio III (Cricket Inns), and the Best Inns portfolio.

* * *

3. There is a basic difference between an investment banking firm acting as principal and an investment banking firm acting as agent. As agent, an investment banking firm does not put any of its own capital at risk and simply agrees to try to sell to others the securities that the corporate issuer wants to sell. However, when an investment banking firm acts as principal -- as Salomon did in the financings of the MOA I, II and III and Best Inns portfolios -- the investment banking firm commits its own capital, actually funds the transaction and assumes all of the risks that go with making such a commitment as principal.

4. In the MOA Portfolio I transaction, Salomon acted as principal and committed to provide on a date certain (or at least within a narrow period of time), a $70.7 million loan to allow MOA to acquire 45 Super 8 motels; in the MOA Portfolio II transaction, Salomon acted as principal and committed to provide on a date certain (or at least within a narrow period of time), a $23.4 million loan to allow MOA

to acquire 7 motels; in the MOA Portfolio III transaction, Salomon acted as principal and committed to provide on a date certain a $63.2 million loan to allow MOA to acquire the 17 Cricket Inns; and in the Best Inns transaction, Salomon acted as principal and committed to provide on a date certain a $24.7 million loan to allow Best Inns to acquire 9 Best Inns of America franchised motels.

5. Salomon's commitments of its own capital as principal were of substantial value to MOA and Best Inns since Salomon's commitments enabled MOA and Best Inns to make their acquisitions and, in at least some cases, to negotiate more favorable terms for those acquisitions. In addition, in making these commitments and providing funds for the acquisitions, Salomon was subject to the market and other risks inherent in principal commitments of this magnitude for which Salomon wished to be compensated.

6. This is illustrated by what transpired concerning MOA's acquisition of Portfolio I. As I indicated in my deposition (pages 863-865), Salomon's original engagement with MOA concerning the acquisition of Portfolio I was to act only as placement agent for MOA and thus Salomon was not to assume the risk of financing the acquisition as principal (see engagement letter dated April 27, 1987, which I understand is Riedel Ex. 39). Under this arrangement, Salomon would attempt to sell the mortgage notes to others and would receive cash fees equal to 2½% of the proceeds of the financing, but would not receive any participation interest in the form of a fee agreement (or otherwise). However, thereafter MOA asked if Salomon would be willing to act as principal and agree to fund the acquisition on a date certain with approximately $70 million of Salomon's own money, rather than simply act as agent for MOA and attempt to sell the notes for a fee. I understood that MOA believed that this would enhance MOA's ability to negotiate the acquisition. Salomon was willing to act as principal and fund the

acquisition, but insisted upon the participation interest embodied in the fee agreement as additional compensation for assuming the principal risk (see first supplement to engagement letter dated July 31, 1987, which I understand is Riedel Ex. 41).

* * *

8. Salomon's commitments as principal also protected MOA against shifts in market interest rates after the date of funding by Salomon; even if interest rates went up after the date of funding, MOA would have locked in its interest cost. Likewise, MOA was protected from the risk that changes in investor sentiment or unexpected developments in the credit markets or motel industry would intervene to impede or disrupt the ability to market nonrecourse motel debt; Salomon -- not MOA -- bore those risks.

9. Because Salomon's commitment to fund these acquisitions as principal was of substantial value to MOA and Best Inns, MOA and Best Inns agreed to give Salomon the participation interests in future net cash flows, sale or refinancing proceeds and appreciation of the motel portfolios embodied in the fee agreements. These participation interests compensated Salomon for the value added that Salomon supplied to the transaction by committing its capital to finance the acquisition as principal as well as the particular risks Salomon undertook in acting as principal.

* * *

11. Salomon believed that the participation interests it was acquiring pursuant to its fee agreements with MOA were of substantial value. Thus:

(a) Prior to the time Salomon committed to finance MOA's acquisition of Portfolio I, Tom Arasi

and I prepared a memorandum dated July 21, 1987 addressed to Salomon's Real Estate Screening Committee to seek the approval of that committee for Salomon's commitment as principal of approximately $70 million of Salomon's funds to finance MOA's acquisition of Portfolio I (I understand this memorandum has been designated APT Ex. 905). As indicated in Section C of that memorandum, we estimated the value of Salomon's participation interest in Portfolio I to be approximately $6.5 million.

(b) I am aware of the allocation agreement between Motels of America and Salomon which I was asked about at my deposition (I understand this allocation agreement has been designated PX 239). As I indicated at my deposition, this allocation agreement was prepared by attorneys for MOA and Salomon to deal with a technical tax issue (see page 856, lines 22-25). Unlike the $6.5 million valuation in our July 21, 1987 memorandum to Salomon's Real Estate Screening Committee, this allocation agreement between MOA and Salomon did <u>not</u> represent our assessment of the economic value of the first participation interest.

(c) Prior to the time Salomon committed to finance MOA's acquisition of Portfolio II, Jay Ahrens, J. Christopher Dorian and I prepared a memorandum dated March 3, 1988 addressed to Salomon's Real Estate Capital Commitments Committee to seek the approval of that committee for Salomon's commitment as principal of approximately $23 million of Salomon's funds to finance MOA's acquisition of Portfolio II (I understand this memorandum has been designated APT Ex. 906). As indicated in Section H(4) of this memorandum, we

estimated the value of Salomon's participation interest in Portfolio II to be approximately $2.5 million.

(d) Prior to the time Salomon committed to finance MOA's acquisition of Portfolio III, J. Christopher Dorian, Kristen Klingbeil-Weis, Tracey Thatcher, Hugh Nickola and I prepared a memorandum dated August 1, 1989 to Salomon's Real Estate Capital Commitments Committee to seek the approval of that committee for Salomon's commitment as principal of approximately $63 million of Salomon's funds to finance MOA's acquisition of Portfolio III (I understand this memorandum has been designated as PX 154). As indicated in Section H(5) of this memorandum, we estimated the value of Salomon's participation interest in MOA Portfolio III to be approximately $12.7 million. As I testified in response to Mr. Jackson's question at my deposition, in November 1989 I continued to believe the potential return from the Portfolio III participation interest could approximate this number (pages 1294-95). This likewise was my belief in December 1989.

12. Salomon's Real Estate Screening Committee (the relevant group in the 1987 time frame) and its Real Estate Capital Commitments Committee (the relevant group in 1988 and 1989) were comprised of senior Salomon executives from the real estate finance group and other areas of the firm. The Real Estate Screening Committee and the Real Estate Capital Commitments Committee gave their approvals for Salomon committing to finance MOA's acquisitions of Portfolios I, II and III, respectively. In co-authoring the memoranda to Salomon's Real Estate Screening Committee or Salomon's Real Estate Capital Commitments Committee referred to above, I in fact had the belief at the time I co-

authored these memoranda that Salomon's participation interests in the MOA portfolios had the approximate values specified in these memoranda.

13. In connection with the MOA Portfolio I transaction, Hospitality Valuation Services, Inc. ("HVS"), an independent real estate consulting and appraisal firm, was retained to appraise each of the Portfolio I properties. The aggregate of the appraised values of the 45 Portfolio I properties as of June 1, 1987 was approximately $95 million. HVS also projected cash flows for the MOA Portfolio I properties.

14. HVS did appraisals and projected cash flows for the 7 motels included in MOA Portfolio II. The aggregate of the appraised values of the 7 Portfolio II properties as of January 1, 1988 was approximately $31.2 million.

15. Kenneth Leventhal & Co. ("Leventhal"), an independent accounting firm with a specialized real estate consulting and appraisal practice, was retained to appraise each of the Portfolio III properties. The aggregate of the appraised values of the 17 Portfolio III properties as of August 1, 1989 was approximately $84.2 million. Leventhal also projected cash flows for the MOA Portfolio III properties.

16. HVS did appraisals and projected cash flows for the 9 motels included in the Best Inns portfolio. The aggregate of the appraised values of the 9 Best Inns motels as of September 1, 1988 was approximately $33.5 million.

17. Salomon would regularly review the performance of all of the portfolios of motels that Salomon had financed because from time-to-time Salomon bought or sold for its own account securities with respect to those portfolios in secondary market transactions and, in addition, from time-to-

time Salomon would own securities with respect to particular portfolios.

18. At no time did anyone tell me that Salomon had agreed to monitor the performance of any MOA portfolio or the Best Inns portfolio on behalf of Ameritech Pension Trust ("APT") or National Investment Services of America ("NISA"). At no time did I tell anyone from APT or NISA that Salomon would monitor any MOA portfolio or the Best Inns portfolio on behalf of APT or NISA. As I testified in my deposition (e.g., pages 455-457), on one occasion, in May 1990, I met with representatives of NISA and APT when I was traveling through Milwaukee, Wisconsin on my way to Madison, Wisconsin on other business. This was the type of informal meeting I would have from time-to-time with parties with whom Salomon transacted and meetings of this nature were a type of business promotion activity for Salomon. I did not attend this meeting because I had been told there was an agreement or understanding that Salomon would monitor APT's participation interest investments on behalf of APT.

* * *

20. I have already testified in my deposition concerning the breakfast meeting at the Town & Country Hotel on or about December 12, 1989 (pages 617-628). As I testified, I do not recall Ameritech being discussed at all during this meeting (pages 624, 626). If the subject of Ameritech did come up even in passing (and I do not recall that it did), I am quite confident that I did not make any statements to the effect that (i) the participation interests on Portfolios I and II did not matter to Ameritech, (ii) Salomon would "take them out" of those investments at "105" (or any other price) or (iii) Salomon could exercise a significant amount of control over Ameritech's investments. As I also testified, I do not recall Riedel or Livingston asking me at this meeting whether

MOA could contact Ameritech (page 625). I could not prevent MOA from contacting Ameritech even if I wanted to and, if they had asked such a question, I would not have told them that they could not contact Ameritech. Indeed, as I testified, my understanding was that MOA was regularly reporting financial information directly to Ameritech (page 1230) and on occasion MOA representatives had indicated to me that they may seek to talk to Ameritech about making additional investments in MOA (pages 624-625). Finally, I have no memory of any discussion at this breakfast meeting concerning the book Liar's Poker. If the subject had come up (and I do not recall that it did) I certainly would not have said that the book was "pretty much true" since I did not think it was.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Declaration of Steven J. Manolis, Managing Director of Salomon Brothers Inc, dated June 8, 1995

(R. 151) (Excerpts)

* * *

1. During the period 1983 to 1991 I was a managing director of Salomon Brothers Inc and manager of its real estate product area. * * *

* * *

3. I have no recollection of any indication by either Mr. Phillips or Mr. Thompson in any introductory call that I made to them in connection with any of the participation interest transitions of even a possibility that there could be a prohibited transaction problem (or any other type of ERISA violation). I did not believe that the sales by Salomon of the four participation interests to APT were prohibited transactions in violation of ERISA. I did not believe that Salomon was a person providing services to APT or a party in interest of APT for purposes of ERISA or a fiduciary of APT.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Declaration Of Gregory A. White, Managing Director Of Salomon Brothers Inc, dated June 12, 1995

(R. 154) (Excerpts)

* * *

1. During the period 1987 through 1990 I was employed as a director and then as a managing director of Salomon Brothers Inc and worked in its real estate finance group.

* * *

3. I understand that plaintiffs have made the charge that at a meeting held on October 20, 1987 at Ameritech's office in Chicago I made an oral agreement with Mr. Thompson of Ameritech, and Messrs. Gorman and Bryden of NISA, that Salomon would monitor the participation interest investment on behalf of APT. However, at no time did I make any such agreement. I would also note the following points:

a. I did not attend any meeting in Ameritech's offices on October 20, 1987. Attached hereto as Exhibit A are excerpts from my expense report for October 1987 and attached hereto as Exhibit B are excerpts from my calendar for 1987 (October 20 appears on page SD1254). As is evident from my expense records and calendar, I was in New York all day on October 20, 1987. The meetings listed in my calendar for October 20 were all in New York, and included an 8 a.m. breakfast meeting, a 12:00 noon lunch meeting, a 4:30 p.m. meeting and a 7:30 p.m. dinner. As evidenced by the charge receipt attached to my expense records, I picked up the check for the

12:00 noon lunch meeting which was held at a restaurant in New York.

b. I note that when Mr. Gorman wrote to me on October 27, 1987 to "affirm" Mr. Thompson's agreement to purchase the first participation interest investment, Mr. Gorman made no mention of any supposed agreement by Salomon to monitor that investment for APT (see Thompson Ex. 18, page A15827, annexed hereto as Exhibit C).

c. The executed assignments for each of the four participation interests say nothing about any supposed agreement that Salomon would monitor these investments on behalf of APT (see, for example, Phillips Ex. 119, annexed hereto as Exhibit D).

4. As I previously testified, we had contacted Ameritech in the fall of 1987 for purposes of determining whether Ameritech had an interest in purchasing the participation interest investment in MOA Portfolio I in view of the interest in very high risk and potentially very high return investments for its pension fund that Ameritech had previously expressed to us at a meeting that was held in Salomon's offices in New York between people from Salomon and Ameritech after Mr. Thompson had joined Ameritech as director of real estate investments (see pages 90-96 of my deposition). I did not call Ameritech in order to attempt to sell the participation interest specifically for inclusion in any particular Ameritech pension fund portfolio; rather, I understood that if Ameritech wished to purchase the participation interest, Ameritech executives would decide how the investment would be handled within the Ameritech pension fund structure.

5. As I also previously testified (pages 107-108, 406-07), in my negotiations with Mr. Thompson concerning the sale of the first participation interest, Mr. Thompson asked

me if it would be possible for Salomon to retain a small portion of the investment. Mr. Thompson explained to me that it would be easier for him to have the investment approved if he could state that Salomon still had a continued economic interest in the participation. I responded that as far as I was concerned I didn't think Salomon would have a problem with that provided that the interest Salomon kept was not so large as to defeat Salomon's goal of selling the investment in the first place. Mr. Thompson suggested that Salomon retain a 5% interest and I told him I thought that would be acceptable.

6. Mr. Thompson and I negotiated the price for the 95% interest to be purchased by APT by taking the potential price we had negotiated for a 100% interest and multiplying that price by 95%. I viewed Salomon's investment in the remaining 5% interest as having a value of approximately 5% of the value of the entire fee agreement, which would be approximately $335,000 for the 5% interest. Salomon anticipated profiting from its investment in this remaining 5% interest. The same is true with respect to Salomon's investments in the 5% interests in the Portfolio III and Best Inns fee agreements not sold by Salomon.

7. In my dealings with representatives of APT, it was always clear to me, and in my view it was always clear to them, that I was representing Salomon's interests and acting on behalf of Salomon, and that I was not in any way purporting to represent or act on behalf of APT.

8. During my dealings with representatives of APT concerning the sales of the participation interests, no one representing APT ever suggested to me, either orally or in writing, that Salomon either was or even might be a fiduciary of APT; that Salomon either was or even might be a person providing services to APT or a party in interest of APT for purposes of ERISA; or that the sales by Salomon of the

participation interests to APT either were or even might be prohibited transactions in violation of ERISA. I did not believe that the sales by Salomon of the four participation interests to APT were prohibited transitions in violation of ERISA. Also, I did not believe that Salomon was a person providing services to APT or a party in interest of APT for purposes of ERISA or a fiduciary of APT.

9. At the time of the participation interest transactions no one representing APT ever stated or suggested that NISA was breaching a fiduciary duty to APT in connection with these transactions and at no time did I conclude that NISA was breaching a fiduciary duty to APT.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Jeffrey Bryden, Vice President of NISA, December 8, 1993

(R. 243: Deposition Binder Vol. 1, Tab 3) (Excerpts)*

* * *

[152:19-155:4]

Q. Do you recall anyone using the term "monitor" during the course of the meeting?

MR. HANSEN: That exact word or the concept?

MR. HEIN:

Q. That word.
A. Yes, I do.
Q. What do you recall being said in that regard?
A. Well, as we were relating, as Mr. Gorman was talking about keeping Salomon in the deal, there was extensive discussions about Salomon taking a lead role in this, since they were the ones who had really structured this

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* [Record No. 243 consists of three boxes containing publicly filed deposition and exhibit excerpts. The parties submitted these materials on the May 1995 cross-motions for summary judgment that were the subject of the district court's June 1996 decision and order, which was reversed by the Seventh Circuit in the decision below insofar as the district court had declined to dismiss Count II. The parties originally filed the Record No. 243 materials in or about April 1996. In connection with preparing the record on appeal for the Seventh Circuit, it became apparent that the Record No. 243 materials were not readily locatable in the district court's files. Thus, in April 1998, the three boxes now docketed at Record No. 243 were refiled. On June 26, 1998, the district court entered an order formally granting permission to refile the three boxes (R. 245).]

from day one, understood the language, understood this entire Fee Agreement and how it was operating; that they would take a lead and monitor specifically the financial information, because the cash flow was based on being able to understand and go through financial statements; and there was some specific language in terms of revenue, expenses, less certain things.

There was a specific lineup of things after which any excess income would be used in this 35 percent interest. And the word -- the word "monitor" was used very much, so that Salomon would act in that, monitor, collect information, go through it. So through all the accounting and assure that this -- any cash flow calculation were being done as originally expected and outlined.

Q. Do you recall any particular person using the specific word "monitor"? That specific word.

MR. HANSEN: Are you asking whose mouth did it come out of, as opposed to did he hear the term used?

MR. HEIN:

Q. Did you actually hear someone use that term?
A. I recall the word "monitor" being used at the meeting, definitely.
Q. Do you recall the specific person who used that term?
A. Mr. Gorman used the term.
Q. Do you recall any specific statement by Mr. White on the subject of monitor?
A. Statements were -- I guess there would be -- More that Mr. White did not take exception to them being in the deal and monitor; and when this was discussed, seemed to accept that position and role going forward without -- you know, did not raise any concern about it.

Q. I take it today that you don't recall what specific statement Mr. White made in that regard at the meeting?

MR. JACKSON: Object to the form of that question. It's misleading and contrary to his prior testimony and suggestive.

MR. HANSEN: Do you remember the words or the substance of the words?

THE WITNESS: No. As I say, I don't recall specific words, but I do recall when discussing it, that he did not react negatively or it wasn't a cause of concern. That he was agreeable to that.

[190:1-18]

Q. Was it your understanding that Mr. Thompson of Ameritech or someone at Ameritech working with Mr. Thompson was going to play some role in monitoring these participation interest investments?

MR. JACKSON: Object. Foundation.

MR. HANSEN: Do you understand the question?

THE WITNESS: No, could you read it back, please?

(Question read aloud by the Reporter.)

THE WITNESS: Yes.

MR. HEIN:

Q. And what was your understanding in that regard?
A. Like you said, that financial information was going to Mr. Thompson, who reviewed that as outlined in our original meeting in October of '87, that Mr. Thompson being a real estate expert understood it and would continue to monitor it and review it.

[199:21-200:2]

Q. As you understood it, as between Ameritech Pension Trust on the one hand and NISA on the other hand, did NISA have as part of its job or part of the services it

provided to Ameritech the job of monitoring the participation interest investments?

A. If by "monitoring" you mean to collect the cash flow along with other securities in the portfolio, yes.

[421:22-423:7]

Q. Do you recall at any point in time prior to the end of 1989 period checking or inquiring of Salomon Brothers with regard to the status of either the first or the second participation interest investments?

A. I'm sorry. Could you read that back again?

(Question read aloud by the Reporter.)

THE WITNESS: Not that I can specifically remember.

MR. HEIN:

Q. Do you have any memory of NISA, you or anyone else at NISA receiving any written report from Salomon Brothers on the status of the first and second participation interest investments at any point in time prior to this late 1989 period you've previously referenced?

A. Including that period?

Q. Up to that period. Up to late 1989.

MR. HANSEN: By "written reports," do you mean to include any documents that contain any information or relating to it, or are you talking about a separate report that summarizes in textual form information?

MR. HEIN:

Q. Let's start with the question in its broadest sense.

A. I apparently can't remember any specific instance.

Q. Do you recall any instance prior to this late 1989 period you've referenced before where you or someone else at NISA received an oral report on the status of Portfolio 1 or Portfolio 2?

A. Not that I can specifically remember.

Q. Do you recall any discussion with anyone at NISA to the effect of, "Why aren't we receiving written reports or oral reports or some other kind of report from Salomon on the status of Portfolio 1 or 2?"

A. Not that I can remember either way.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Kenneth F. Feld, Ameritech Manager, Private Investments, September 16, 1993

(R. 243: Deposition Binder Vol. 1, Tab 12) (Excerpts)

[5:14-15; 5:24-6:11]

Q. When did you retire?
A: November of '90.
Q: What was your last position at Ameritech before you retired?
A: You mean title?
Q: Title.
A: Manager, private investments.
Q: Did you have any other titles or positions at the time that you retired?
A: No.
Q: When did you become manager, private investments at Ameritech?
A: Late '88, early '89, in that time period.

[229:10-230:18]

Q: And it was NISA's job, as you understood it, to monitor the participation interests in some way, given that they were the investment manager holding the account that held the participation interests, is that correct?
A: That's correct.
Q: Prior to the time that you wrote this memo, did anybody tell you that Salomon had agreed to monitor the participation interests on behalf of Ameritech or NISA?
A: No. I didn't even know they were there.

Q: Okay. I mean at the meeting in Milwaukee on May 21, did anyone tell you that Salomon had agreed to monitor the participation interests on behalf of Ameritech or NISA?
A: No.
Q: Okay. Subsequent to that meeting, after that meeting and leaving aside any conversations with counsel, did anyone ever tell you that Salomon had agreed to monitor the participation interests on behalf of Ameritech Pension Trust or NISA or Ameritech?
A: Not to my knowledge.
Q: And at that time that you wrote the May 24, 1990, memo to Mr. Malone, Feld Exhibit 50, no one ever told you that Salomon was monitoring the participation interests on behalf of Ameritech or NISA?
A: No.
Q: No one had ever told you that, is that correct?
A: No one. That is correct.

[654:4-656:10]

BY MR. CONWAY:

Q. At any time during the May 21, 1990, meeting at NISA, did anyone say anything about how or whether the Motels of America and Best Inns investments were being monitored?
A. I discussed that with Jeff Bryden, and I'm not sure if it was within that meeting. My recollection would be it was not within that meeting, but it – because, again, that would not have been a subject that Mr. Henry would have been involved in. That was a separate side discussion, but it was discussed, but my recollection would be not at that meeting.
Q. So it's your best recollection that the monitoring of the participation interests was not discussed in Mr. Henry's presence on May 21, 1990?

A. That's my recollection.
Q. I take it no one told you during the meeting that Salomon and Ameritech or NISA had agreed that Salomon would monitor the four investments, is that correct?
A. That's correct.
Q. No one told you that?
A. No one told me.
Q. And no one told you during this meeting that Ameritech had hired Salomon or that NISA had hired Salomon to monitor the participation interest?
A. No one told me anything in that regard.
Q. And did anyone ever tell you that? Did anyone ever tell you that – at any time, that Salomon and Ameritech or NISA had agreed that Salomon would monitor the Best Inns and Motels of America investments?
A. It was – as part of a discussion later, and maybe before that meeting with Bryden, I was told that NISA felt that they had – that Salomon was monitoring it, because they had an interest in it, but that was not an agreement or anything like that.
Q. Okay. So the answer to the question whether anyone ever told you that Salomon on the one hand and Ameritech or NISA on the other hand had agreed that Salomon would monitor the Motels of America and Best Inns investments, no one ever told you that, is that correct?
A. Not to my – no, I don't recall anybody ever saying that.
Q. And is it correct that no one at any time ever told you that Ameritech or NISA was paying a fee or other compensation to Salomon Brothers in exchange for monitoring the Motels of America or Best Inns investments?
A. To my knowledge, there was no fee. It was never discussed with me.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Joseph E. Gorman, President, CEO and Director of NISA, November 30, 1993, March 24, 1994

(R. 243) (Sal. C.A. App. 588-618, at 589, 590, 591, 594, 611) (Excerpts)

[36:13-19 (Sal. C.A. App. 589)]

Q. Am I correct that during the period 1987 through 1989, you were president, CEO and director of NISA?

A. Yes.

Q. Generally, what was the nature of your responsibilities in that capacity at the time?

A. They are pretty much contained in the title: President, chief executive officer and director.

[53:15-54:3 (Sal. C.A. App. 590)]

Q. Did you or NISA, to the best of your knowledge, act improperly or violate ERISA in connection with the participation interest investments?

A. No. To my knowledge, no.

Q. To your knowledge, did Thompson or Don Phillips -- Tom Thompson or Don Phillips of Ameritech act improperly or in violation of ERISA in connection with the participation interest investments?

A. Not to my knowledge.

Q. To the best of your knowledge, did Salomon act improperly in connection with the participation interest investments?

A. Two answers. It's been questioned, and - But to the best of my knowledge, no.

[55:19-24 (Sal. C.A. App. 591)]

Q. When, as you recall it, did someone from Ameritech first question whether Salomon had acted improperly or in violation of ERISA in connection with the participation interest investment?

A. Probably the first meeting after the notice of bankruptcy.

[124:23-125:7; 126:3-24 (Sal. C.A. App. 594)]

Q. At the time the transactions were entered into, the purchase of the participation interest in the Motels of America and Best Inn's fee agreements by NISA for APT, did you believe that those transactions were prohibited transactions under ERISA for which no exemption was available?

A. No.

MR. JACKSON: The answer?
THE WITNESS: No. That is no, I did not believe they were prohibited.

Q. * * *

This is the pleading that is the current operative pleading that Ameritech has filed against Salomon in this case.

And the second sentence of Paragraph 76 states, "Salomon knowingly participated

in NISA's fiduciary breaches by selling interests in Fee Agreements 1 through 4 to NISA for APT's dedicated bond portfolio."

And my question of you is whether, to your knowledge, NISA committed any breach of fiduciary duty by purchasing the interests in the Motels of America or Best Inns' Fee Agreements, which are referred to here as Fee Agreements 1 through 4?

A. My answer is I don't know how to define fiduciary breaches in any sense that gets into legal or judgmental about the facts of this or not. But that we did not knowingly breach any fiduciary duty.

[764:25-765:4; 765:10; 765:18-22; 766:11 (Sal. C.A. App. 611)]

Q. Okay. To your knowledge, Mr. Gorman, did NISA ever identify Salomon Brothers to either Harris Trust or to Ameritech as being a fiduciary or a party in interest of Ameritech Pension Trust at any point in time prior to 1990?

THE WITNESS: To my knowledge, no.

Q. To your knowledge, at any point from January 1, 1990, to the present, has NISA identified Salomon to Harris Trust or to Ameritech as being a fiduciary or party in interest of the Ameritech Pension Trust?

THE WITNESS: Not as I recall.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Joseph E. Gorman, President, CEO and Director of NISA, November 30, 1993, December 1, 1993, March 24, 1994

(R. 243: Deposition Binder Vol. 2, Tab 17) (Excerpts)

[116:1-4]

Q. Were there other investments that were made where Ameritech, in effect, proposed the investment for NISA's consideration?
A. Yes.

[116:14-16]

Q. Would that include the Motels of America and Best Inns' investments?
A. Yes.

[131:5-132:1]

Q. Did NISA have the sole responsibility for the decision to purchase interests in the Motels of America and Best Inns' Fee Agreements that were purchased for APT's dedicated portfolio?
A. There's been a lot of whittling to get to a question that's still very difficult to answer. Much as Scott says, I don't understand what "sole responsibility" means in all instances.

So I can easily answer the question - the question that he rephrased, which is, could we have said no? Yes, we could have said no.

So in that respect, we could have unilaterally said no to the investment. In making the investment, we relied upon the advice, the information and the investment expertise of people other than ourselves in the area of real estate and in the area of motels and hotel properties and in the area of appraising them and pricing them. So we did rely upon other parties' expertise. We did rely on other parties' information. But could we have said no? Yes, we could have said no. We chose to say yes to the investment.

[132:8-25]

Q. Did you rely in part on the expertise of Mr. Thompson of Ameritech in making the Motels of America, Best Inns' investments?

MR. JACKSON: Object to the form.
THE WITNESS: Yes.
MR. HEIN:

Q. With respect to each of the four investments, each of the four Motels of America and Best Inns' investments, had the initiation or proposal that the investment be made in the dedicated portfolio come from Ameritech?
A. Please reread it.

(Question read aloud by the Reporter.)

MR. HANSEN: Do you mean by that, whether it came – was brought to his attention by someone from Ameritech?

MR. HEIN: Yes, that's correct.
THE WITNESS: Yes.

[136:14-137:12]

Q. In the second, third and fourth participation interest transactions, who on behalf of Ameritech or APT actually negotiated the price with someone at Salomon?
A. To the best of my knowledge, it was – Well, I guess I should say I don't know. I assume it was Thompson, but it may have been Thompson and Phillips.
Q. In connection with the first participation interest transaction, who negotiated the price with Salomon?
A. Well, it depends on what all you conclude in the negotiation, I guess. We had a hand in it. There was work done on it before we arrived, before it was presented to us. In effect, we reviewed the work and accepted it. And then as I say, because of the retaining of a piece of it, it went back for final calculation between Thompson and Salomon.
Q. With respect to the first participation interest transaction, was it your understanding that there had been a back and forth, on the subject of price between Thompson and Salomon that NISA was not involved in?
MR. JACKSON: Object. Foundation.
THE WITNESS: Yes.

[144:9-13]

Q. Apart from checking the due diligence, was NISA in a functional sense, as you understood it, responsible for actually performing the due diligence on behalf of APT with respect to the purchase of the four participation interests?

[145:3-146:4]

THE WITNESS: When the idea of investing in real estate first surfaced, we explained to the staff of Ameritech that we had no real expertise to examine real estate-type investments.

When Mr. Thompson joined the staff of Ameritech, we were informed that he was the real estate expert; that Ameritech was going to develop a portfolio of real estate holdings through Mr. Thompson's auspices. That some of these might find their way into the dedicated portfolio, and that we should rely upon his expertise in this.

So that's what was – was agreed to; and when it came time, as we would turn to a Downs organization or some other organization that was an expert in real estate, we turned to Ameritech, Mr. Phillips and Tom Thompson.

MR. HEIN:
Q. With respect to the four participation interest investments, did NISA look to and rely on the real estate expertise of Mr. Thompson and Mr. Phillips of Ameritech for the evaluation of those investments?
MR. JACKSON: Object to the form.
MR. HANSEN: You mean rely on them to the exclusion of others, or rely on them in part?
MR. HEIN:
Q. Rely on them at least in part.
A. Yes.

[159:20 - 161:12]

Q. In relation to each of these four participation interest transactions, was it your understanding that Salomon Brothers was selling the investment to APT or proposing to sell the investment to APT?
A. Yes.

Q. And was it your understanding that NISA and APT were on the buyer's side of a proposed transaction, where Salomon was the seller and APT or NISA was proposed to be the buyer?
A. Yes.
Q. In each of the four participation interest transactions, was it your understanding that Salomon owned the participation interest it was attempting to sell?
A. Again, yes, I guess – Yes.
Q. In each of the four participation interest transactions, was it your understanding that Salomon Brothers, in attempting to make the sale, was acting for its own account?

MR. HANSEN: You mean solely for its own account to the exclusion of the interests of Ameritech?

MR. HEIN: For its own account in the sense it was selling an investment to obtain for itself the proceeds of the investment.

MR. HANSEN: Now if that's black and white, you can answer. If not, you can explain.

THE WITNESS: Maybe try reading it.

(Question read aloud by the Reporter.)

THE WITNESS: As I understand the question, I guess the answer would be yes, they were acting for their own account.

MR. HEIN:

Q. Did you complete your answer?
A. Yes.
Q. Was it your understanding in each of the four participation transactions, that the interest of Salomon as a seller and the interest of APT or NISA as the potential buyer were at odds with each other?

MR. JACKSON: Object, vague.

THE WITNESS: I guess I would have to say to an extent they were at odds with each other.

[264:1-9]

Q. Am I correct that since 1989, there has been a sharp correction in the real estate markets generally in the United States?

MR. JACKSON: Object. Foundation.

MR. HANSEN: I object to the form of the question. Vague.

THE WITNESS: Are you correct? If my understanding of the newspapers is correct, yes. That's correct.

[328:8-12]

Q. Are you aware of anything in writing created prior to November of 1990 that sets forth in writing any agreement by Salomon to monitor or provide oversight on behalf of NISA or APT?
A. Not that I can think of right now.

[340:6-341:14]

BY MR. HEIN:

Q. Mr. Gorman, do you recall at this meeting in Chicago Mr. White articulating any specific steps or procedures that Salomon would take to monitor the participation interest investment?
A. It would have been in response to our requests along the lines that I discussed before. I don't remember specifics.
Q. Did you have an understanding as of October 1987 of specific steps or procedures that Salomon would undertake going into the future in the course of monitoring the first participation interest?

MR. HANSEN: Do you understand what he means by specific steps?

A. I don't know how to answer it yes or no without saying they would have agreed to be -- to do the things that I mentioned in the earlier testimony.

MR. HEIN:

Q. Can you be any more specific than that in terms of what your understanding was as of the fall of 1987?

A. I had been before. I don't know that it will either be complete or exactly as I said before, but it would be that they would act as the lead banker, that they would follow the evolution of the company, check its performance out against the plan, would be a part of the group that oversaw the recalculation of value when a refinancing occurred or a sale or the termination of the agreement, that they would keep in mind their own interests and Ameritech's interests in that being favorable, that they would follow the company's cash flow projections, and see to it that they and we received our equitable share of the cash flow as conceived in the sharing agreement that they sold to us.

[381:13-19]

Q. Were you generally aware that the implementing or transactional documentation for the transaction was subsequent to the meeting you've described thereafter worked out between Thompson and Greg White of Salomon?

MR. JACKSON: Object to the form.

A. I would assume that it was. I don't recall the period or discussion relating to it.

[519:10-25]

Q. Do you have any memory at all of the second transaction being presented to NISA as a fait accompli in effect with

Ameritech asking NISA to sign off on it, as distinct from NISA being approached at the very inception of the discussions with Salomon on the second transaction and then participating in some dialogue? Do you recall one way or the other which circumstance if either of those eventuated here?

MR. JACKSON: Object to the form and foundation.

A. You'll simply have to recall that we looked upon Ameritech and their staff as the experts in the real estate side of things. It wouldn't have been necessary that we were involved from the inception. They would have turned to us and made a case for the investment. We would have decided one way or another whether the investment was going to be made.

[527:3-16]

Q. Did Mr. Thompson from time to time forward to you copies of financial statements that he received from Motels of America?

A. Not as we would have expected them. At some point he began to forward financial statements. We expected them from the beginning. We got them later on in the process, and again I don't recall when.

Q. And when you say that Thompson did not do this as you would have expected, what are you referring to?

A. Forwarding cash flows as -- or financial statements as he received them.

Q. And why did you have that expectation.

A. We expected to be informed to keep our files up-to-date, et cetera.

[564:24-565:6]

Q. Did you and Mr. Bryden, to your knowledge, attempt with respect to the third and fourth participation interest investments to review yourselves the projections with respect to future performance that were being provided?
A. I've said before, I don't recall the specifics. In general, we relied upon the work that Mr. Thompson did to assess the value and compatibility and so forth of the properties.

[581:15-583:18]

Q. Mr. Gorman, you previously have testified to your recollection of a personal meeting with Greg White at Ameritech's offices, which you identified as October 20, 1987, based on your calendar entry. Let me direct your attention to two documents that have been marked as Bryden Exhibits 332 and Bryden Exhibit 333. Let me just represent to you, Mr. Gorman, what these are.

Exhibit 333 is Greg White's calendar, and if one will turn to Page SD1254 page with October 20, 1987, I will represent to you that Mr. White has certain events scheduled here: Breakfast, lunch, and then commitments in the afternoon and evening on October 20th, all of which were in New York, and he has a note, "call Ameritech."

Exhibit 332 is from Mr. White's expense records, and your copy may be a little difficult; but I will represent to you that the first entry is dated October 20th, refers to a lunch with Mason Ross, which corresponds to the noon lunch with Mason Ross on Mr. White's calendar for October 20, 1987.

Then attached is the credit card receipt for that lunch, which also is dated October 20, 1987, for Delmonico's, a restaurant in New York. My question is: Based on the fact that Mr. White's calendar and his expense records

place him in New York, including at a lunch in New York on October 20, 1987, is it possible that your memory that he was personally present with you at a meeting in Chicago that same day is mistaken?
A. The possibility would be there. I suppose that some other Salomon representative was at the meeting. There's no possibility – and that in some way the names were confused. That's at least an open possibility at this time. There was a Salomon representative there who was representing the real estate proposal, and there's no confusion about that. I could probably not identify Greg White today if he showed up in front of me, so –
Q. What you're saying is you cannot say with certainty that it was Mr. White as opposed to some other Salomon person at this meeting on October 20th that you previously testified to?
A. Yes. As far as I'm concerned, the name Greg White was a reconstruction because he was tied into the records we had.
Q. By "reconstruction," you're referring to the reconstruction that you and Mr. Bryden did in the fall of 1990; is that correct?
A. That's correct.

[594:8-12]

Q. Mr. Gorman, with respect to the purchases of each of the four participation interests, was NISA's role or did NISA play the role of a skeptical buyer?
A. I would say they certainly tried to be, yes.

[715:1-12]

(Deposition Exhibit No. 359 was marked for identification by the Court Reporter.)

MR. HEIN:

Q. Let me direct you to the second page through the end of the document, beginning 48949 through 51. It's the portion that follows the cover letter and begins NISA 48949 through 51, a document you prepared?

A. Yes.

Q. Did you prepare this document in the regular course of business at NISA?

A. Yes.

[716:12-717:6]

Q. Let me direct you specifically to Item 2 of the first paragraph. In Item 2, the – see the sentence, "The Ameritech staff felt the proposal, $8,565,000 in total," and says – this is what I want to focus on, -- "was too small to look at as a separate project, but too lucrative not to own."

Was that, in fact, said to you by representatives of Ameritech at the time of the first or second participation interest investments?

MR. JACKSON: Object to the form.

THE WITNESS: I mean, that's how I remembered it then without any attempt to be precise about it – about the way it was stated.

MR. HEIN:

Q. Who from Ameritech were you referring to with your use of the word "Ameritech staff" in this sentence?

A. Probably Don Phillips.

[736:1-16]

Q. At some point in time, Mr. Thompson was hired, and you were advised of that; is that correct?

A. That's correct.

Q. Do you recall any comments by Mr. Phillips or anyone else at Ameritech as it relates to the fact that Thompson had now been employed in connection with this – in connection with this concept of bringing things in-house?

MR. JACKSON: Object to the form.

THE WITNESS: Not specifically in that direction. There were – There were comments to the effect that Ameritech now had a real estate specialist, and that they were going to build upon that; and that they would begin, and I believe they did begin to look at very large projects in the real estate area.

[807:24-808:9]

[Q.] As I understand it, there were certain assumptions made as to what the dedicated portfolio had to earn to pay the share of retirement benefits that it was being dedicated to cover; correct?

A. Yes.

Q. Am I correct that NISA, in managing the dedicated portfolio, had been able to enhance the return through a variety of different trading strategies; is that correct?

A. Yes.

[809:6-21]

Q. As far as you were concerned, when the investments in the four participation interests were made, was it this excess return component of the dedicated portfolio that

was being put into those participation interest investments?

MR. HANSEN: You mean some small portion of that?

MR. HEIN:

Q. Some portion of that, right.

A. Yes.

Q. So from your point of view as manager of the dedicated portfolio, you were not jeopardizing the ability to cover the stipulated payments to retirees by making these investments; is that correct?

A. That would be correct.

[812:15-22]

Q. Am I correct that any loss that was suffered by the dedicated portfolio on the participation interest investments simply reduced the amount of this excess profit that you alluded to before the break?

MR. JACKSON: Object to the form.

THE WITNESS: That's a way of looking at it, yes.

[975:21-976:5]

Q. From your perspective, was the making of these four investments approved by the responsible Ameritech executives in charge at the time?

MR. JACKSON: Object to the form. I object on foundation purposes.

THE WITNESS: I will need to hear it again, because I didn't get all of that, the substance of it.

(Question read aloud by the Reporter.)

THE WITNESS: Yes.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Mark T. Livingston, President of Motels of America, August 16, 1994

(R. 243: Deposition Binder Vol. 3, Tab 28) (Excerpts)

[6:16-18]

Q: When did you first become employed as an employee of Motels of America?

A: Effective 1-1-90.

[8:7-9]

Q: What position did you assume on January 1st, 1990 with Motels of America?

A: President.

[166:9-167:6, 167:23-168:11]

Q: What I'd like you to do is tell me in words if you can remember, in substance if you cannot remember the exact words, what was discussed at the meeting and by whom.

A: Let's see. As I recall, the meeting was called in part to introduce myself to Chuck [Henry] in part, to discuss the performance of the properties in part because of the convenience of the fact that they were here all the way from New York on another matter, but you know, wanted to stay, you know, tuned in to our operating performance and staying in close contact as they had.

So the breakfast meeting there was some discussion regarding the performance of the various portfolios.

There was some discussion regarding this — the

remainder interest in one of the portfolios. I don't remember which one it was. It wasn't Portfolio III. It was one of the other two.

* * *

And then we were talking – And I'm not sure in terms of the exact sequence of the events here, but we were talking about distributions on one of these portfolios, and the fact that the investors were not going to get what they were expecting, and Chuck making a comment that it wasn't relative – and it was relative to Ameritech, that it was very small. It was a very small investment for Ameritech, and that it really didn't matter. We'll just take them out at 105, which was, you know, we'll take them out at 5 percent over what they had invested.

[175:16-176:6]

BY MR. JACKSON:

Q. Do you recall whether or not there was any discussion at this meeting about a sale of any part of the Cricket fee participation interest to the Ameritech Pension Trust?

A. Not specifically, no.

Q. Did you have any information from any source at the time of this Town & Country meeting that Salomon was discussing with Ameritech Pension Trust the possible sale of the Cricket fee interest to Ameritech Pension Trust?

A. I'm assuming you're referring to what hasn't been sold at this point in time, which is Portfolio III?

Q. Yes.

A. Not that I can recall.

[180:12-16]

Q. Okay, I'm going to show you what's been marked as Thompson Exhibit-37. It's a December 22, 1989 letter to Motels of America, and it's addressed to Guy Hatfield.

And if you'll look at the second page, you'll see that – Is that your signature?

A. Oh, yes.

[181:14-16]

Q. Do you remember whether there was any delay in your receipt of this document?

A. Not off the top of my head, no.

[182:2-183:8]

Q: Do you remember whether there was any discussion regarding the assignment of the 95 percent interest of Salomon to the Ameritech Pension Trust?

A: There was some discussion, but I don't remember exactly what was discussed.

Q. Can you separate — Geoff Rich was general counsel?

A. Yes.

Q. Can you separate in your mind discussions outside of the presence of Geoff Rich but still within Motels of America?

A. I mean, any discussions with Geoff Rich would have just been very perfunctory with respect to what the document is.

Q. I am not going to ask you what he told you because I'm going to respect the attorney/client privilege between MOA's lawyer and you as an executive for Motels of America.

What I'm trying to figure out is, do you remember any discussions outside of the presence of Geoff Rich about this document?

A. About this document specifically?

Q. Yeah, or the event of the assignment of the fee interest.

A. The event of the assignment —
MR. HEIN: Object to the form.
THE WITNESS: I don't — I mean. I know we had — I know the discussions had come up. I couldn't tell you exactly when some of them were.

[183:10-184:10]

Q: What discussions -- With what people are you remembering discussions?

A: I vaguely remember -- I don't remember whether it was with -- Judy and Carl were involved in it, but Chap and -- and I can't remember whether, you know, Guy or Mike, but it wasn't one discussion.

I mean, it's not like we had one discussion and it was never brought up again. I mean, there was several discussions relating to the value of the participation interests, and in my -- my read on it was -- and my discussion and the opinions that I personally expressed in those discussions related to being somewhat incredulous, I think, at what was being sold. I mean, it was kind of like selling air, in my opinion.

Q: Why did you feel that way?
MR. HEIN: Object to the form.
THE WITNESS: I had a very hard time understanding how somebody could risk that much money for such a low and maybe no rate of return. And, you know, that's my personal opinion expressed, but I wasn't the only one that expressed it.

[185:6-17]

Q. Did you have the viewpoints you've just expressed at the time you signed the assignment of the fee interest in the third portfolio, which is Thompson Exhibit-37?
MR. HEIN: Object to the form of the question.

You're not putting before Mr. Livingston the documents that would tend to suggest when MOA received it. Also otherwise object to the form.
THE WITNESS: I don't recall specifically.

[573:6-17]

Q: At the time you came in as president, you thought that the imbalance between supply and demand with, more supply coming on line, would not be as severe as it turned out to be; is that correct?

A: That's correct.

Q: And as of the time you came in as president of Motels of America, you thought that if the operational issues of Motels of America were addressed, Motels of America could be successful; is that correct?

A: That's correct.

[579:12-23]

Q: It's kind of the first full paragraph beginning two-thirds of the way down, the second column it says, quote, the economy limited-services lodging section is still considered healthy, close quote.

The question is whether that was your understanding of the lodging market for economy limited-service motels as of the end of 1989?

MR. JACKSON: Object to the form.

THE WITNESS: Yeah. I'd say in general – pretty much in general.

[581:4-582:8]

Q: Do you recall whether as of January 1990 Motels of America's plans for the Cricket Inn future were for growth?
A: I think I answered that before. The answer was that there was some – they had two different scenarios, that I recall. One was growing through franchise, and the other was growing through development.
Q: As of early 1990 – let me just focus you. You referred, in page 66 of your deposition, to Mr. Riedel's thought that the Cricket Inns could be expanded into a viable regional franchise.
Do you see that?
A: 66?
Q: Right. It's lines 17 and 18.
A: Uh-huh. Yes.
Q: Was that still Mr. Riedel's view, as you understood it, as of early 1990?
A: I believe so.
Q: Did Mr. Riedel continue to work on potential development plans for the Cricket Inns in early 1990?
A: I believe so.
Q: Was it Mr. Riedel's intention as of early 1990 to attempt to obtain new financing to build new Cricket Inns?
MR. JACKSON: Object to the form.
THE WITNESS: I believe so.

[587:17-588:10]

Q: You referred to getting the owners and the management team on the same page. As of the time you came in as president, in January of 1990, do you believe there was steps that you could take, obviously with others, that could further this objective or goal of getting everybody on the same page?

A: Yeah.
Q: And as of the time you came in as president in January of 1990, were you optimistic or hopeful that you could accomplish that objective?
MR. JACKSON: Object to the form.
THE WITNESS: Yes, I was. A challenge, but I – I thought a lot about the risk and accepted that challenge with optimism that we would be able – that we would be able to be successful.

[590:20-592:3]

Q: But the bottom line – as of December 14th, 1989, the conversation with your dad that you recounted is that your bottom line was that you believed that Motels of America could be successful?
MR. JACKSON: I object based upon his prior testimony and the context in which it was given.
THE WITNESS: Yeah. I believed – you know, I believed that we had an opportunity to be successful. It was worth taking the risk.
BY MR. HEIN:
Q: Did you believe there'd be a reward if you were successful?
A: Well, actually from my perspective, it was very successful. And as I previously mentioned to you, there was some information that I wanted to be able to keep, and that information related to the performance of the properties subsequent to the implementation of the program that I described to you. And it was very dramatic improvements in many of the properties. Within 30 to 60 days subsequent to implementing the program, training the managers in the particular regions, and then taking the program back to the properties at a point, where I think I also mentioned before, with this

card, you could have gone to any room attendant or front desk person and asked them what the purpose of the company was, and what their role was and how it tied into that, and I think that was very powerful.

[619:10-15]

Q: As of January 1990, did you have a sense of optimism about the future of Motels of America?
A: I felt that I had an opportunity to make an impact and that the company could have a good future.

[620:5-621:24]

Q: Do you recall any discussion in connection with your becoming president about one of your focuses and responsibilities being efforts to better control expenses?
A: That was definitely a part of our discussion.
Q: As of January 1990, did you believe you could have a positive impact in better controlling expenses at Motels of America?
A: Yes.
Q: You've testified about your goal or concept of reducing centralized management in San Diego and putting management out into the field. Do you recall that generally?
A: Yes.
Q: As of January 1990, did you plan to establish regional management in field locations for the Cricket Inns?
A: Not as of January '90, no.
Q: Conceptually as of January 1990, did you have decentralization and the establishment of regional management in mind as a concept?

A: I can't – it's been so long ago, I can't tell you exactly when I had solidified my concept.
Q: At some point in time, you did determine conceptually that it would be better to decentralize management; is that correct?
A: Yes.
Q: And when you determined it would be better to decentralize management, was that judgment relative to the Cricket Inns as well as the other portfolios?
A: Yes.
Q: And did you believe that decentralization of management would improve the performance of the Cricket Inns.
A: Absolutely.
Q: Did you implement plans to decentralize management for the Cricket Inns?
A: Yes.
Q: Did that, in fact, improve performance?
A: Yes, it did. It was –

[640:18-21]

Q: Had you personally anticipated the severity of the decline in the lodging market that occurred in 1990?
A: No.

[648:6-12]

Q: Do you recall any occasion on which you or someone in your presence stated to someone from Salomon prior to July of 1990 that Motels of America would not be able to service the Portfolio III debt?
MR. JACKSON: Object to the form.
THE WITNESS: Not specifically, no.

[649:17-650:8]

Q: Let me direct your attention now to the breakfast meeting at the Town & Country in December of 1989 that you've given prior testimony about. Did you make any written notes at that breakfast meeting?
A: No, I did not.
Q: To your knowledge, did Mr. Riedel make any written notes at that breakfast meeting?
A: I don't recall.
Q: Do you recall making any notes of what was said at the breakfast meeting following the meeting?
A: I don't recall.
Q: Do you know if Mr. Reidel made any notes following the meeting?
A: I don't recall.

[658:19-659:11]

Q: Do you recall — even if you can't recall a specific, do you recall generally whether anything optimistic or positive or hopeful, even in the slightest bit, was said at the meeting?

MR. JACKSON: Object to the form.

THE WITNESS: I'm certain there was, but I'm — not specifically.

BY MR. HEIN:

Q: Why are you certain there was, even though you don't recall specifics?
A: Because, as I stated before, Mr. Riedel is very optimistic and would look at the opportunity that he sees — and myself as well, looking at, you know, what can we manage? What can we impact? How can we make a difference? How can we improve?

[769:6-13]

Q: Do you recall either you or Mr. Riedel telling Mr. Henry at the Town & Country meeting that you, Mark Livingston, had been brought in for the purpose of giving Motels of America firmer control on operations, among other things?
A: Very likely, but I don't specifically recall.

[770:11-16]

Q: Did you or Mr. Riedel tell Mr. Henry at the Town & Country meeting that one job that you would have would be to attempt to better control expenses?
A: Highly likely, but I don't recall that specifically.

[777:16-778:2]

Q: Did you or Mr. Riedel make any express statement at the Town & Country meeting about the amount of the distributions expected for Portfolio I?
A: You know, with this time, I just vaguely remember discussing the subject, that's it.
Q: Do you recall you or Mr. Riedel making any express statement about the amount of distributions expected for Portfolio II?
A: Same answer.

[801:8-803:9]

[Q:] If you look at the total room sales lines, am I correct in terms of my reading of this statement that the actual total room sales for Portfolio I for the month of

October 1989 itself were greater than the room sales in the prior month, the year before the October 1988?

A: Yes.

Q: Likewise, am I correct that in the categories departmental income, gross operating profit and net cash flow performance in October of 1989 for Portfolio I had been better than the year before, October 1988?

A: Yes.

Q: If you will turn to Livingston Exhibit 521, again just to be sure we are on the same wavelength in terms of our reading of these statements, am I correct that performance for Portfolio I in November of 1989 had been better than performance the year earlier in November of 1988 in the categories of total room sales, departmental income, gross operating profit and net cash flow?

A: It certainly appears that way.

Q: Would it be fair to say looking at performance of Portfolio I in October and November of 1989 as compared to the performance a year earlier, that the performance would appear to be stabilizing in relation to the prior year's performance?

MR JACKSON: I object. That is a grossly unfair question. It is also misleading.

THE WITNESS: I am not sure what you mean by "stabilizing," but they do appear to be doing well relative to the prior year.

BY MR. HEIN:

Q: I am now going to direct you back to Livingston Exhibit 517 which was looked at previously. This is a Portfolio II statement for October of 1989.

Again, just looking at the month of October of 1989 in the categories total room sales, departmental income, gross operating profit, and net cash flow, am I correct that the performance for Portfolio II in October of 1989 had been better than a year earlier?

A: Yes.

Q: Would it be fair to characterize these results for Portfolio II as being good in relation to the prior year?

A: I think so.

[804:17-805:4]

Q: Do you recall a specific statement by yourself at the Town & Country meeting to the effect that there would be no distribution to Salomon Brothers for Portfolio III?

A: Specific statement — I don't recall.

Q: Do you recall a specific statement by Mr. Riedel at the Town & Country meeting that there would be no distributions to Salomon Brothers for Portfolio III?

A: I don't recall specific statements at this time.

[811:18-813:12]

Q: Let me direct you to APT Exhibit 306 which you previously have been shown by Mr. Jackson. The first page is a transmittal by Mr. Hatfield back to Mr. White on January 30th, 1990 of a signed direction letter regarding Portfolio III and I believe you've previously been shown, as per the last page, that you signed the document.

A: And I signed the document?

Q: Is that correct, that you signed the last page of a direction letter page MOA14563?

A: Yes. The thing that is puzzling me, okay, this is January 30th.

Q: Yes.

A: Yes, that is my signature.

Q: At the time that you signed this direction letter, presumably at the end of January 1990, did you write to

Mr. Henry or Mr. White or anyone at Salomon to state that there would be no cash flow on Portfolio III?

A: Not to my knowledge.

Q: To your knowledge, did anyone at Motels of America at the time this letter was signed in January of 1990 write to Salomon to state that there would be no cash flow on Portfolio III?

A: I'm not aware of anything specifically, no.

Q: You recall I showed you that Mr. Riedel had written to Mr. Thompson on January 15th, 1990, I believe that is Riedel Exhibit 98. Do you recall having seen that just a short while ago here this afternoon?

A: Right here. Yes.

Q: To your knowledge, did anyone at Motels of America, at or about the time that you signed the direction letter for Portfolio III in January of 1990, write or communicate to Ameritech to say there would be no cash flow on Portfolio III?

A: I don't recall all the circumstances surrounding that. Chap Riedel is a better person to ask.

[879:13-17]

Q: Prior to this July 9, 1990 letter, are you aware of any written communication to Salomon Brothers stating that Portfolio III would not be able to make debt service?

A: Not that I can recall.

[935:19-936:11]

Q: Mr. Jackson referred you to APT Exhibit 300. The minutes of the November 10, 1989 meeting.
Mr. Jackson referred you to the statement by Mr. Riedel November 10, 1989 results of operations to date are mostly as expected.

A: Yes.

Q: Am I correct you don't know one way or another what expectations Mr. Riedel is referring to there; do you?

A: I will tell you, I said this before, Mr. Riedel is very optimistic. The glass is always half full, it doesn't matter if it is a quarter full. He is a very, very optimistic individual. In a board of directors setting I think he would paint the most optimistic light on it. That is my two cents on that one.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Donald W. Phillips, Chief Investment Officer of Ameritech Corporation, September 20-21, 1993

(R. 243) (Sal. C.A. App. 631-650, at 632, 635, 638, 639) (Excerpts)

[6:13-23 (Sal. C.A. App. 632)]

Q. Were you employed by Ameritech Corporation or Ameritech Pension Trust or by both during the period 1987 through early 1990?

A. It was always my understanding that I was employed by the corporation in that period of time.

Q. And what was your position with Ameritech Corporation during that period?

A. I started out as the director of investment management and the title was later changed to chief investment officer.

[30:9-31:6 (Sal. C.A. App. 635)]

Q. To the best of your knowledge, did you act improperly or in violation of ERISA in connection with the participation interest investments?

A. I have never in my life acted in violation of ERISA or other than in the best interests of the pension fund.

Q. To the best of your knowledge, did Tom Thompson act improperly or in violation of

ERISA in connection with the participation interest investments?

A. He did not.

Q. To the best of your knowledge, did NISA act improperly or in violation of ERISA in connection with the participation interest investments?

A. They did not.

Q. To the best of your knowledge, did Salomon act improperly or in violation of ERISA in connection with the participation interest investments?

A. They did not.

[47:7-10; 47:22-48:15 (Sal. C.A. App. 638)]

Q. During the period 1987 through 1989, did you believe that APT's purchases of these participation interests were transactions involving a party in interest that were prohibited by ERISA?

* * *

A. To the best of my knowledge, there was no party in interest transaction.

* * *

Q. To the best of your knowledge in the 1987 through 1989 period, was Salomon Brothers a party in interest of APT?

A. To the best of my knowledge, no they were not.

Q. At the time you were employed by Ameritech Corporation, did anyone ever tell you that

they had any issue or concern about whether Salomon was a party in interest?

A. No.

Q. Did anyone ever tell you that they had an issue or concern about whether the participation interest transactions were prohi l transactions with a party in interest?

A. No. That was never brought up.

[68:16-69:10 (Sal. C.A. App. 639)]

Q. Was it your understanding that Salomon in the potential or proposed sale of the participation interest was representing Salomon's own interest?

A. Yes.

Q. And was it your understanding that Salomon Brothers was not purporting to represent APT's interest?

A. Yes.

Q. Was it your understanding that Salomon was purporting to advise APT on what price APT should pay?

A. No.

Q. Did you understand that the interests of Salomon as the potential seller and the interests of APT as the potential buyer were at odds with each other?

A. Yes. Any time you have a seller and a buyer they each have different objectives.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Donald W. Phillips, Chief Investment Officer of Ameritech Corporation, September 20, 1993

(R. 243: Deposition Binder Vol. 4, Tab 39) (Excerpts)

[31:7-14]

Q. Subsequent to 1989, did the real estate industry generally suffer from declines in values?
A. Yes.
Q. And I understand what you said before about the special nature of hotels or motels, but did the hotel and motel industry likewise suffer from a decline in values subsequent to 1989?
A. Yes.

[33:23-34:22]

Q. Was the decline in values in the real estate sector that occurred after 1989 something that was generally foreseen or predicted prior to it occurring?
A. No.
Q. Specifically did you personally anticipate that decline in values before it happened?
A. I don't think anybody did and was able to accurately determine that.
Q. As you understand it, have numerous pension funds and other institutional investors lost money in real estate investments since 1989?
A. Yes.

Q. And as you understand it, have numerous pension funds and institutional investors lost money in investments in the hotel and motel sector since 1989?
A. Yes.
Q. Apart from the participation interest investments that are the subject of this lawsuit, do you know whether Ameritech Corporation or APT suffered losses on other real estate investments?
A. Yes, I'm sure that they have.

[42:17-21]

Q: Did Thompson or anyone else at Ameritech ever tell you that Salomon had agreed to monitor or manage any of the investments in any of the participation interests?
A: Not to my knowledge.

[43:14-17]

Q. Was it NISA's responsibility as you understood it to monitor those participation interests?
A. Yes.

[48:16-49:11]

Q. Who made the decision to purchase the participation interests as you understood it?
A. It was made at NISA. Who specifically I don't know whether that was Joe Gorman or whether that was a gentleman by the name of Jeff Bryden at the time. He was the specific portfolio manager on the account.
Q. Did you make the decision to purchase any of the participation interests?
A. No.

Q. Was the decision to purchase the participation interests as you understood it approved or ratified or confirmed by anyone at Ameritech Corporation?
A. No.
Q. Was the decision to purchase the participation interests required to be approved or ratified or confirmed by any individual or committee at Ameritech?
A. No.

[92:10-18]

Q. Okay. Was it your understanding that NISA would be monitoring the financial performance of these participation interest investments?
A. Yes.
Q. Did Mr. Manolis in the conversation you had with him state that Salomon would monitor the financial performance of the investment for Ameritech?
A. No.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Charles A. Riedel, Executive Vice President, Chief Financial Officer and Secretary of Motels Of America, April 23, 1993

(R. 243: Deposition Binder Vol. 4, Tab 43) (Excerpts)

[65:11-66:20]

Q: Do you recall Mr. Thompson of Ameritech calling you at one time and asking you about a question about some financial statement?
A: I do remember a phone call from a Mr. Thompson, yes.
Q: And did you understand who he was representing?
A: Yes.
Q: And he was representing Ameritech?
A: That's what I understood, yes.

* * *

[157:14-161:12]

Q: Do you recall that at some point the subject of Salomon Brothers acting as principal and purchasing the notes for its own account as opposed to simply acting as placement agent came up?
A: Yes.
Q: And how did that come up?
A: I can't recall when or exactly how the conversation came up but it was part of how Chuck justified that they could take this participation because they were risking the firm's capital.
Q: Do you recall what he said in that regard?
A: Just what I said there; that they were risking their capital and they deserved a participation.

Q: Did Motels of America express a desire or need to have a firm commitment on the financing from Salomon Brothers as opposed to simply a best efforts undertaking to try to raise the money?
A: Yes.
Q: And when did Motels of America express that need for a firm commitment from Salomon?
A: I can't tell you a time.
Q: And why was it that Motels of America needed that firm commitment from Salomon?
A: We needed to be sure that the transaction was going to close because we were committing substantial funds towards the acquisition. If it didn't close we would lose those funds.
Q: Did it assist Motels of America in entering into an agreement to purchase the 45 Super 8s in Portfolio I that Motels of America was in a position where Salomon was committing to supply the capital as opposed to simply acting as agent to try to find buyers for the notes?

MR. HAMILTON: Would you read that question back?

(WHEREUPON, the record was read by the reporter as requested.)

MS. ALBRECHT: Let me clarify something here. To whom do you refer when you refer to Salomon? Are you referring to one party, more than one party? Are you making a distinction between Salomon Brothers, Inc., Salomon Brothers Realty?

MR. HEIN: No, I'm not.

MR. HAMILTON: Object to the form; leading.

BY THE WITNESS:

A: We did think that aided us, yes.

BY MR. HEIN:

Q: And in what way did it aid you?

A: It gave the seller of the properties the comfort that we could close the transaction which helped in our negotiations with the seller.

Q: And among other things it helped Motels of America achieve a better price than it otherwise might have?

MR. HAMILTON: Objection; leading.

BY THE WITNESS:

A: It may have. I'm not sure.

BY MR. HEIN:

Q: In the case of Portfolio II did Motels of America likewise need a firm commitment of the funds as opposed to simply a best efforts attempt to try to sell notes for that transaction?

A: Yes.

Q: And in that transaction did it assist Motels of America in negotiating the terms of the acquisition, including the price of the acquisition, that Motels of America was to have a firm commitment from Salomon to supply the funds as opposed to simply a best efforts undertaking to try to sell notes?

MR. HAMILTON: Objection; leading and lack of foundation; no indication as to how this witness could really answer that question.

BY THE WITNESS:

A: I believe it did help us.

BY MR. HEIN:

Q: And in the Portfolio III or Cricket acquisition, did Motels of America in that transaction need a firm commitment by Salomon to supply funds as opposed to simply a best efforts undertaking to try to sell notes?

A: Yes.

Q: And did the fact that Motels of America was to get a firm commitment from Salomon to supply the funds as opposed to simply a best efforts undertaking to try to sell notes, did that assist Motels of America in negotiating terms of the acquisition including price?

MR. HAMILTON: Objection on the grounds of lack of foundation, leading and compound.

BY THE WITNESS:

A: I believe it helped us, yes.

[441:6-442:4]

Q: And do you recall that when Mr. Livingston came aboard in November and December of 1989 part time there was some feeling of optimism that he would in fact assist efforts to better control administrative and general expenses?

MR. JACKSON: Objection; leading.

MR. HAMILTON: Objection; leading and vague.

BY THE WITNESS:

A: I believe the way to describe it was we had a sense of optimism that we were going to change the management structure of the company that would benefit MOA, and Mark Livingston would be a good person to help orchestrate that.

Q: That was the thought process in the fall of 1989 on that subject, is that correct?

A: Yes.

Q: Was it the belief at that time within MOA that with this change in management structure with bringing Livingston on board that progress could be made in better controlling those expenses?

MR. HAMILTON: Objection; leading.

BY THE WITNESS:

A: Yes.

[457:11-458:21]

Q: Let me direct your attention to minutes that were previously marked and direct you specifically to the minutes in Exhibit 17, August 11, 1989.

Let me direct your attention to page 2 of the minutes and you will see there is a sentence part way through the second paragraph there which says, "Mr. Riedel stated the timing of closing was timed beautifully because the day following closing the rate went up 50 basis points." Do you see that?

A: Yes.

Q: And what was the point you were making in that statement to the Board?

A: If we would have waited one more day, we would have paid 50 more basis points on the note.

Q: And had interest rates indeed gone up by 50 basis points the next day?

A: Yes.

Q: Was that a fairly dramatic move?

A: It was significant, yes.

Q: And was that a reflection of the volatility at the time in the financial markets?

MR. HAMILTON: Objection; foundation.

BY THE WITNESS:

A: It may have been, yes.

Q: And did it cost MOA a penny more by virtue of the fact that the day after the closing rates had gone up 50 basis points?

MR. JACKSON: Object; argumentative.

BY THE WITNESS:

A: Well, our rate was locked at the time of closing.

Q: Locked in by Salomon, correct?

A: Yes.

[463:17-20]

Q: Do you recall making the statement to the Board on November 10, 1989 that the results of operations to date are mostly as expected?

A: Yes.

[468:8-469:8]

Q: And if you will direct yourself to the page MOA7936, the first page of Exhibit 73, which is a January 25, 1990 letter, Mr. Winston makes the statement, "Through 1990 we will be promoting Cricket Inns at a level that they have never been marketed before. $750,000 will be spent in direct sales, advertising and marketing Cricket Inns."

Was that MOA's plan and intention as of January, 1990?

A: I don't recall if those were the specific numbers. I would assume those are correct.

Q: And if you will look at the next paragraph, it says "Our plans for the future are for growth." Was that MOA's plans as it related to Cricket in January, 1990?

MR. HAMILTON: As relates to Cricket, was that the question?

MR. HEIN: Yes.

BY THE WITNESS:

A: That was a possibility, yes.

Q: And that was what MOA was hoping for as of January, 1990, growth of Cricket Inns, is that correct?

A: Yes.

[469:17-469:20]

Q: Can you identify Exhibit 74 for me?

A: This appears to be a general information package on Motels of America that was produced by Motels of America.

[470:9-12]

Q: Was this prepared, this particular document, Exhibit 74, prepared in or about May of 1990?
A: The date on it is May, 1990.

[471:3-21]

Q: Let me direct your attention to page 7873. Do you see the statement there in bold print, quote, "MOA will continue to improve and expand its operations on a controlled basis"?
A: Yes, I see that.
Q: Was that MOA's plan as of May, 1990?
A: Yes, although I think improve and expand its operations on a controlled basis may need some definition and explanation.
Q: Did MOA as of May, 1990 project that its occupancy would increase from 64 percent in 1989 to 66 percent by 1992?
A: That's what it says here, yes.
Q: And did MOA project as of May, 1990 that its average daily rates would increase from $33 in 1989 to approximately $38 during the next five years?
A: Yes, that's what it says here in this document.

[472: 5-18]

Q: First let me just direct you back, I'm sorry, to Exhibit 74 and page SB7872. Do you see the third kind of bold heading which reads, quote, "MOA will continue to build equity and provide financial stability"?
A: Yes.
Q: Was that MOA's plan or intention as of May, 1990?
A: Yes.
Q: Under that it says that MOA will do this, quote, "through the profitable operation of its existing portfolio," close quote. Was that MOA's plan as of May of 1990?
A: Yes.

[559:11-560:11]

Q: So your best refreshed recollection is that you did have a conversation with Thompson where he made a request that certain information be supplied to NISA, is that correct?
A: Yes, I believe so.
Q: And in response to that request, did MOA supply to NISA whatever information Mr. Thompson requested that it do so?
A: I'm not sure. I believe we would have responded to any reasonable request.
Q: Mr. Riedel, did Motels of America from time to time supply information to Ameritech concerning the performance of the different motel portfolios in which Ameritech had a participation interest?
A: I believe so, yes.
MR. JACKSON: Object, lack of foundation.
BY MR. HEIN:
Q: Did Motels of America from time to time supply copies of the monthly financial statements that were produced with respect to the particular portfolios to Ameritech?

MR. JACKSON: Object, lack of foundation.
BY THE WITNESS:
A: I believe so, yes.

[724:9-13]

Q: You recall there was a breakfast meeting at the Town & Country at some point in December, 1989?
Do you recall that:
A: Yes.

[779:3-10]

Q. Specifically, you recall no discussion about the Portfolio III or Cricket Inn fee agreement, is that correct?
A. I don't recall if there was any discussion about it.
Q. Do you recall any discussion of Ameritech at the Town and Country meeting?
A. No, I don't.

[897:17-898:17]

Q. Did you play a role in preparing Exhibit 143?
A. Yes.
Q. Do you see on Page A679, second paragraph, the statement, quote, "It is important to note that our analysis of the individual markets has revealed that the region is under-performing national averages because of general economic conditions and that Cricket Inn occupancies reflect this," close quote.
Was that your view in August of 1990?
MR. JACKSON: Object, leading.
BY THE WITNESS:

A. Yes, its was.
BY MR. HEIN:
Q. And if you'll look at the first bullet that follows, the — it states, quote, "The regional economy is suffering from unexpected slowdowns in the backbone manufacturing industries of the area, such as construction and textiles, tobacco and furniture processing. The area is also being impacted by cutbacks in military spending," close quote.
Was that your view in August of 1990?
A. Yes, it was.

[949:14-24]

Q. Do you recall any discussion with Mr. Roquemore or Mr. Port wherein either or both of them expressed a desire to have a firm commitment from MOA with respect to MOA's ability to finance the acquisition of the Cricket Inns?
A. Yes.
Q. What do you recall in that regard?
A. Simply that they were desirous of knowing that the transaction would be completed, and they were looking for some surety that financing could be arranged for the transaction.

[950:18-951:20]

Q. Do you recall that the subject of assurances with respect to a firm commitment or surety on the financing came up in the context of renegotiation of the price or terms of the acquisition?
A. I remember it did, yes.
Q. Can you tell me about that?

A. I can't tell you the details. I remember that, as we attempted to renegotiate the transaction, they wanted to know that the transaction was going to be completed if they agreed to changes.

Q. Am I correct that Turnpike's position was that they would agree to the changes in the terms that MOA was requesting on the condition that MOA provide evidence of surety or assurances as to the fact that financing would be in place?

MR. HAMILTON: Objection. Leading.

MR. JACKSON: Object to the form.

BY THE WITNESS:

A. Well, that was part of the negotiations. I'm not sure what they would have agreed to.

BY MR. HEIN:

Q. But that was their position at the negotiations.

A. That was their posturing, yes.

[953:13-22]

Q. But in response to the Turnpike requests for assurances of certainty as to the money being there, MOA pointed to the fact that Salomon had acted as principal and could act as principal again for Cricket Inns, is that correct?

A. That's pretty much correct, yes.

Q. And thereafter MOA succeeded in getting Turnpike's agreement on terms more favorable to MOA, correct?

A. I believe so, yes.

[981:18-984:7]

Q. What was your understanding as to why the demand was dropping?

A. The economy in general was weakening; and, again, in the markets that we were in, Cricket Inns, it was particularly soft in those markets.

Q. The economy was?

A. The economy.

Q. This is as of the summer of 1990?

A. Yes.

Q. And were there any other events with respect to world affairs or world circumstances that impacted adversely on the markets for the Cricket Inns as of the summer of 1990 and the fall of 1990?

MR. JACKSON: Object, lack of foundation.

MR. HAMILTON: Objection, lack of foundation.

BY THE WITNESS:

A. Well, there were numerous events that you deal with every year that are just part of doing business that affected us, but the big effect was just too much supply and too little demand.

BY MR. HEIN:

Q. Do you recall whether the Iraqi invasion of Kuwait had any impact?

A. It did, yes.

Q. What was the nature of that impact?

MR. JACKSON: Objection, foundation.

BY THE WITNESS:

A. It varied from property to property. Some operators were negatively influenced as demand dropped. Other properties, some that were near military bases, actually got a positive effect from it.

Our overall feeling was that net we had a negative impact from the Gulf War.

BY MR. HEIN:

Q. There had been increases in supply in the various years prior to 1990, had there not?

A. Yes.

Q. And in those years there had been corresponding increases in demand, is that correct in general?

MR. JACKSON: Object, foundation.

BY THE WITNESS:

A. That's a pretty broad statement. Historically, supply had been less than demand, although there were always peaks and valleys.

Sitting here now and looking back, in hindsight 1990 was probably the worst year that the hotel industry ever had; and that can be well documented.

BY MR. HEIN:

Q. Was that because, unlike prior years, demand, rather than rising to fill the supply, instead dropped?

A. That's part of the equation, yes.

MR. JACKSON: Objection.

BY MR. HEIN:

Q. So when you refer to an oversupply, that's an oversupply in the context of dropping demand, is that correct?

A. Again, yes, that's part of the equation.

[1196:6-1197:9]

Q: Did you discuss with Mr. Henry how much of the participation had been sold to Ameritech?

MR. HEIN: On what occasion? You are talking about Portfolio I now.

MR. JACKSON: That's what I thought he was referring to.

BY MR. JACKSON:

Q: Go ahead.

A: I believe it was stated in the information they sent to us how much they had sold.

Q. Do you recall whether it was 100 percent or something less?

A. I think they - Salomon retained a very small portion of it. I don't remember the percentages exactly.

Q: Did Mr. Henry tell you why that was the case?

A: I believe at the time he said it was because they wanted to continue to track the progress of the portfolio.

Q: Who wanted to continue to track the progress of the portfolio?

A: Salomon did.

Q: Did you discuss with Mr. Henry what he was going to do to track progress of the portfolio?

A: Only that we would continue to send to him the operating results and financial statements from the properties.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Lloyd B. Thompson, Ameritech Director of Real Estate Investments, January 14 & 15, 1993, September 30, 1993

(R. 243: Deposition Binder Vol. 5, Tab 55) (Excerpts)

[6:16-24]

Q. Mr. Thompson, were you employed by Ameritech Corporation at some point in time?
A. Yes, I was.
Q. And during what period of time was that?
A. From mid-1987 to September of 1990.
Q. What was your position with Ameritech Corporation during that period of time?
A. I was director of real estate investments.

[7:22-8:5]

Q. As of 1987 when you joined Ameritech Corporation, in mid-1987, how many years experience did you have with real estate and real estate investments?
A. Over ten years.
Q. As of 1987 when you joined Ameritech Corporation were you also an attorney?
A. Yes, I was.

[8:9-14]

Q. To whom did you report at Ameritech in the period mid-1987 through September, 1990?
A. Donald Phillips.
Q. And what was his title?

A. Chief investment officer I believe.

[13:9-20]

Q. Subsequent to, after, December of 1989, did the real estate industry generally experience some significant declines in real estate values?
MR. FELDMAN: Objection to the form of the question.
BY THE WITNESS:
A. Yes, there has been — I'm not sure that I could put the time frame to December of '89, but I think certainly there has been a decline in real estate values during the years following.
Q. The years following December, 1989?
A. Yes.

[14:21-15:5]

Q. Would it be correct as a general matter that all of the sectors in the hotel/motel industry suffered in the period following December, 1989, to a greater or lesser extent, but did suffer along with the entire real estate industry?
MR. NICKELS: Objection; foundation.
MR. FELDMAN: And form.
BY THE WITNESS:
A. I believe that's the case, yes.

[18:17-19:8]

Q. Mr. Thompson, as of 1989 did you personally know in advance that the real estate industry was going to suffer this decline in values that occurred thereafter after 1989?
A. No

Q. As of 1989 did you personally predict in advance that the real estate business would suffer this decline in values that occurred after 1989?
A. No, I did not.
Q. Was the decline in real estate values that occurred after 1989 something that was generally foreseen or generally predicted before it happened?
MR. JACKSON: Object; foundation
BY THE WITNESS:
A. Not to my knowledge.

[77:2-78:3]

Q. Who made the decision to purchase on behalf of any fund or account managed for APT the four participation interests?
A. I believe NISA.
Q. Was there anyone else other than NISA, to your knowledge, who made the decision to purchase the four participation interests on behalf of APT or a fund managed for APT?
A. I'm not aware of a decision other than the NISA decision.
Q. Was the NISA decision, to your knowledge, to purchase the four participation interests approved by any person or committee outside of NISA?
A. I'm not aware of any committee outside of NISA.
Q. What about persons outside of NISA?
A. I'm not privy to any conversations that Don Phillips would have had. I don't know anybody else who would have been involved.
Q. Okay. To the best of your personal knowledge, then, the NISA decision to make the purchases of the four participation investments was not approved by any person or committee outside of NISA, is that correct?
A. I don't know of specific approval.

[205:23-206:6]

Q. Did you assume that NISA was monitoring the participation interest investments because NISA was the investment manager that made the investments?
A. The investment management function which they were managing, as I understood it, all of the investments within their portfolio would have included these transactions.

[206:7-207:21]

Q. And is the fact that NISA was the investment manager and held the participation interest in its portfolio the basis for your assumption that they would be monitoring them?
MR. NICKELS: In addition to the conversation he has already described to you with Mr. White.
BY THE WITNESS:
A. I was going to relate that the impression that I had from statements made during conversations with Mr. White is that Mr. White -- that Salomon, rather was going to provide information and monitor, which they indicated they were already doing, the Motel of America investments and that at least in one conversation that I can remember in which Mr. Gorman was involved that was a specific discussion item.
Q. When did this conversation occur?
A. It was a part of the conversation where Mr. White described this investment to Mr. Gorman and there may have been others as well from NISA in this conversation. I don't recall. But I was a part of the conversation as well.
Q. Sometime in the fall of 1987?
A. It would have been in the fall of '87, yes.
Q. Do you recall the specific statement by Mr. White to which you are alluding?

A. I don't recall the specifics of the statement. I recall the specific tenor and coverage of the statement in my mind, which was that Salomon, and as a backdrop to the -- this particular point, Salomon, as among other discussion items in that meeting and previously on other conversations with me, had indicated their existing involvement in the transaction, that they were already set up, had people monitoring the transaction and that Mr. Gorman specifically indicated his concern that the monitoring continue. I do not recall the specific language.

[209:24-210:4]

Q. To your knowledge, was there ever a written agreement with Salomon whereby Salomon agreed to monitor the participation interests on behalf of Ameritech?
A. I don't know of any such agreement.

[283:7-284:11]

Q. At some point, you told Mr. White that a particular price was something that Ameritech would deem to be an acceptable price, is that correct?
A. Yes, I believe so.
Q. And was the price that you told White would be an acceptable price to Ameritech a price lower than the price initially proposed by Salomon?
MR. NICKELS: Object to the form.
BY THE WITNESS:
A. Yes.
BY MR. HEIN:
Q. Who made the decision to tell Salomon that a particular price was acceptable to Ameritech? Was it you? Was it Mr. Phillips? Was it NISA? Was it someone else?

A. From the standpoint of my responsibilities, Mr. Phillips would have determined that that was an acceptable price.
Q. Was that based on your recommendations?
A. It was based on my review.
Q. Did you make a recommendation to Mr. Phillips as to what you viewed to be an acceptable price?
A. I believe that I made a — a review of the transaction and suggested that I thought it was an attractive price. I don't remember whether there was ever the use of the word recommendation or it was in that context.

[285:1-286:16]

BY MR. HEIN:

Q. Let me just -- is there anything further that you can recall about any of the conversations you had with Mr. White prior to the conference call or meeting where White and NISA both participated --
MR. JACKSON: Thank you.
BY MR. HEIN:
Q. -- that you've not already recounted?
A. Yes. There was a discussion on Salomon retaining an interest in the transaction.
Q. What was said on that subject?
A. The specific language I can't draw on, but I can tell you that the discussion centered on the knowledge that Salomon was already in the investment. It was their investment. They had people up monitoring and tracking the investment. I had indicated yesterday that they said that they could do that and would.
And we believed that their having some involvement -- a retention of an involvement in the transaction was appropriate for that consideration. Greg indicated that he did not think that that would be a problem.

Q. Mr. White did not think it would be a problem for Salomon to retain an interest in the participation interest, correct?

A. Well, that he did not think that there would be a problem for them to retain an interest in the participation, but I don't want to limit that response to indicate that he was indicating that there was a problem in some other area.

They clearly agreed that they were in a position to and would monitor the transaction, and this discussion on the retention of the interest was a part of that discussion.

Q. You understood that from Mr. White that Salomon, because it had this participation interest, was monitoring the transaction, correct?

A. They told me they were.

[288:18-23]

Q. Did you ever make the statement in words or substance to Mr. White that Ameritech requests Salomon to monitor the transaction on behalf of Ameritech?

A. I don't recall making that statement, no.

[319:3-320:2]

(WHEREUPON, the record was read by the reporter as requested as follows: Mr. Thompson, is there anything in Exhibits 36, 37, 38, or 39 that talks about Salomon Brothers having a responsibility to provide reports to NISA?)

MR. JACKSON: Same objection.

MR. NICKELS: Same objection.

You can answer.

BY THE WITNESS:

A. Okay, I don't see anything in those documents to that effect.

MR. JACKSON: Move to strike.

BY MR. HEIN:

Q. Are you aware of any written document pursuant to which Salomon accepted or undertook a responsibility to provide reports to NISA concerning the participation interest investments?

MR. NICKELS: Asked and answered.

MR. JACKSON: Same objections

BY THE WITNESS:

A. I'm not aware of such a document.

MR. JACKSON: Move to strike.

[329:11-18]

Q. You understood Greg White was looking out for Salomon's interests, correct?

A. Yes.

Q: And you understood that someone on the Ameritech side, either at Ameritech or NISA, was looking out for the Ameritech and NISA interests, correct?

A: Yes.

[367:16-369:12]

(WHEREUPON, the record was read by the reporter as requested as follows: And are you aware of any written document which reflects an agreement by Salomon to monitor, track, watch, or provide information to NISA?)

BY THE WITNESS:

A. I'm not aware of any document that specifies the tracking, monitoring, watching, of the investment for NISA.

BY MR. HEIN:

Q. Are you aware of any written document that talks or refers to Salomon as managing any of the participation interest investments —

MR. JACKSON: Object. Vague.

BY MR. HEIN:

Q. — for Ameritech or NISA?

A. I'm not aware of a document that refers to Salomon managing the investment.

Q. Do you recall any discussion where anyone from Salomon agreed to manage the participation interest investments?

A. I don't recall a discussion that referenced the word "management."

Q. Do you recall any discussion where anyone from Ameritech or NISA asked that Salomon manage any of the participation interest investments?

MR. JACKSON: In words?

If you don't clarify, I will object, vague.

BY THE WITNESS:

A. I'm sorry. I'm lost.

MR. HEIN: Reread the question.

(WHEREUPON, the record was read by the reporter as requested as follows: Do you recall any discussion where anyone from Ameritech or NISA asked that Salomon manage any of the participation interest investments?)

BY THE WITNESS:

A. I don't recall that reference to managing in conversation, no.

[532:12-24]

Q. Was it your understanding that Mr. Phillips was looking to you to, in effect, be of assistance to NISA in assisting NISA in its evaluation of the proposed interest

investment to the extent that your real estate background might be of use to NISA?

A. It was my understanding that I was supposed to review the information that was provided by Salomon for -- or rather from Salomon and that I would be discussing that information with Salomon in connection with the transaction and that, in effect, would be a resource for NISA to draw on for this.

[533:1-2]

Q. You would be a resource to NISA?

A. Yes.

[676:1-14]

[Q.] As a general matter, you were familiar with the use of what we'll call 100 percent financing, correct?

A. Uh-hum.

Q. And that was a situation where someone in buying a real estate asset was able to find someone to lend them essentially all the money it took to make the purchase?

A. Uh-hum.

Q. And you were aware that each of these four transactions had involved 100 percent financing, correct, roughly?

A. Roughly.

Q. Roughly 100 percent?

A. Yes.

* * *

[678:3-11]

Q. Let me just – you understood that the mortgage notes that provided the 100 percent financing on these different projects were nonrecourse to MOA or, in the one case.

Best Inns, [--] is that correct? Meaning that MOA or Best Inns was not obligated to pay the notes, that the only recourse of the noteholders was to the properties themselves, is that correct?

A. Yes, yes.

* * *

[788:5-10]

Q. Was it your understanding that Salomon did not pay money out of pocket but rather got the fee agreement as compensation for arranging debt financing?

A. I knew that was part of their arrangement, yes.

[869:20-870:23]

Q. Did Salomon Brothers in 19—the period 1987 through 1989 control any communications between Motels of America on the one hand and APT or NISA on the other hand?

MR. JACKSON: Object. Foundation

BY THE WITNESS:

A. I don't recall that there any such agreement to that effect. I don't remember thinking about that. Salomon – there was information which came to our office certainly from Motels of America.

BY MR. HEIN

Q. Without going through Salomon?

A. That was my recollection.

Q. Do you know what – I take it that you at APT did not establish any procedures for monitoring the performance of the Motels of America portfolios; is that correct?

A. It was my understanding that that was being done at NISA and not at Ameritech. I did not establish any procedures.

Q. Your understanding was that NISA had that responsibility?

A. I didn't – I'm not quite sure what the breadth of the question is, but it was my understanding that the information – the receipt of the information and the tracking was being done by NISA.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Gregory A. White, Managing Director of Salomon, December 16, 1992

(R. 243: Deposition Binder Vol. 5, Tab 59) (Excerpts)

[89:19-24]

Q. What was the nature of your involvement with respect to the transfer of the fee agreement dealing with MOA Portfolio I?
A. I had a series of conversations with Mr. Tom Thompson of Ameritech regarding the potential investment.

[90:22-91:25]

Q. What were the subject matters of these telephone conversations?
A. I related to Mr. Thompson the investment or described generally an investment that Salomon Brothers was to be offering, in this case the fee agreement for MOA I, and I related it to a meeting that I had been part of some time earlier with Mr. Thompson and Mr. Don Phillips of Ameritech and Mr. Manolis of Salomon Brothers, Mr. Mark Field of Salomon Brothers. And there may have been others, many others, I really don't recall who else was in attendance.

But in that meeting, Ameritech via Phillips and Thompson had asked that Salomon Brothers make them aware of deals that we would be marketing that were of a very high risk and potentially very high return nature.

We had subsequent conversations that related to the specifics of what the fee agreement was, its risk characteristics in terms of how the cash flows of the fee

agreement were structured. We spoke about potentially adverse tax consequences, specifically unrelated business income tax, UBIT as it's commonly referred to.

Mr. Thompson said that he would take the agreement and have it reviewed by counsel on that point. And we generally spoke about the pricing of the issue.

[146:21-147:11]

Q. What I'm trying to find out is whether we're talking that you don't know now because people forget things or whether this is something that you never knew.
A. The only involvement I have had with NISA was a brief conversation that related to the mechanics of document and money transfers. Any other role they had I was not familiar with.
Q. And you previously had testified related to NISA, and is that National Investment Services, Inc.?
A. Correct.

MR. WALTON: Does that comment apply just to MOA I or is that all the deals?

THE WITNESS: All of them.

[451:6-8]

Q. While we're talking about meetings, do you recall ever meeting with anyone from NISA?
A. No.

[451:21-452:6]

Q. Do you ever recall a meeting at any time where there were present at that meeting one or more people from

NISA and one or more people from Ameritech and one or more people from Salomon that you attended?

A. I am fairly certain I've never met anyone from NISA and I'm fairly certain I've never been in a face-to-face meeting regarding the selling of these investments to Ameritech with anyone from Ameritech.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Deposition Transcript of Carl Winston, Vice President of Operations of Motels of America, August 30 & 31, 1994

(R. 243: Deposition Binder Vol. 5, Tab 61) (Excerpts)

[78:23-80:3]

Q: Did you discuss your personal view regarding financial viability with Mr. Riedel?

A: I discussed it with all the members of the executive commitment as well as the owners of the company.

Q: As best you recall, what did you say to them?

MR. HEIN: Object to the form. It's totally undefined in terms of when, where, circumstances. Also lacking foundation.

THE WITNESS: That the amount of cash flow that could be generated from the properties did not appear to me to be sufficient to support the debt service.

BY MR. JACKSON:

Q: Did you say anything further?

MR. HEIN: Object to the form.

THE WITNESS: Well, the thing I recall that relates to this matter is that I do have this recollection of making a comment to the same group of people that I thought when I had learned, and I believe it was subsequent to the acquisition, that Ameritech had bought the appreciation rights -- and that was my understanding at the time, was that they had purchased the right to a gain -- any and all gain in the value of the portfolio -- I made the comment that I felt they bought air. That phrase stayed with me since that time.

[80:5-25]

Q: I represent the record in this case is that Ameritech bought an interest – 95 percent of Salomon's participation interest in the Cricket properties in December 1989.

Using that as a point of reference, can you fix in the time when you learned that Ameritech bought appreciation rights?

MR. HEIN: I object to the form. I think that that's misleading, because the documentary evidence indicates that the notification to MOA may not have been received until sometime in January of 1990.

MR. JACKSON: That may be. That may be.

BY MR. JACKSON:

Q: The documents were executed between Ameritech and Salomon on December 22, 1989.

A: I don't – I can't recall when I was informed of the nature of the Ameritech purchase – the existence or the nature of the Ameritech purchase.

[415:1-416:10]

CARL WINSTON

Q: What did you mean by the expression "Ameritech bought air"?

MR. HEIN: Object to the form.

THE WITNESS: My general recollection is that it's -- by buying the air rights over the Empire State Building -- not that specifically, but by example, the air rights over the Empire State Building are probably worthless, and my view was that the right to appreciation -- in fact, if that's what they bought -- was worth nothing because there wouldn't be appreciation, in my view.

BY MR. JACKSON:

Q: What was the basis for your view that you didn't think there'd be appreciation?

MR. HEIN: Object to the form.

THE WITNESS: It was the -- what I expected would be the cash flows resulting from operations and how those cash flows related to the debt service that I was aware of.

BY MR. JACKSON:

Q: Can you be a little more specific?

A: It was my view at the time that there wasn't going to be enough cash flow from operations to make the mortgage payment.

MR. HEIN: Object to the form.

THE WITNESS: Therefore, there was no -- there was nothing left, and the property -- and it was inevitable that there would be no appreciation. The price above that and the price -- there would be no additional -- there would be no appreciation above the price paid by Motels of America for Portfolio III.

[511:25-512:7]

Q: Was the press release in Christensen Exhibit-480 prepared and distributed by Motels of America in or about August of 1989 in the regular course of business?

A: I don't recall exactly when it was distributed, but it would have been distributed as part of the normal course of business.

[512:19-513:7]

Q: Let me direct your attention to the first paragraph on page 2 of this press release. It's the page with Bates number MOA-8684 which starts with the quote from you. Do you see that it's the paragraph beginning, quote, "Cricket is like a pretty girl with many suitors,' says Winston"?

A: Yes.
Q: Did you authorize the use of that quote in this press release?
A: Did I authorize it?
Q: Right.
A: Yes.

[519:22-520:6]

Q: Putting aside the question of the amount of debt that Motels of America might incur to finance the acquisition, viewing the properties as properties putting issues of debt levels aside, did you believe that as a package, the Cricket Inns represented attractive motel properties to acquire?

MR. JACKSON: Object to the form.

THE WITNESS: Yes.

[524:19-525:3]

Q: When you say that you have a general recollection that the cash flows over time would be insufficient, that was your personal opinion? Am I correct?
A: That was my personal belief.
Q: And did Mr. Riedel have a different view on that subject prior to the acquisition?
A: Mr. Riedel was significantly more optimistic.

[543:12-544:11]

Q: Let me direct your attention to Item 4 in Mr. Hatfield's November 27, 1989 memo. He states, "With respect to the prototype of Cricket Inns, the lobby is equivalent to,

if not a little bit better than, the Hamptons and the property would compete with the Hamptons and Fairfields," close quote.

Do you recall Mr. Hatfield expressing that point of view in late 1989?

MR. JACKSON: Object to the form.

THE WITNESS: Mr. Hatfield was of the opinion, in general, that Motels of America should be growing. I can't pin it to a specific month, but my recollection is that he wanted to grow the Cricket chain.

BY MR. HEIN:

Q: Do you recall any points of view expressed by Mr. Hatfield with respect to the quality of the prototype of Cricket Inns?

MR. JACKSON: Object to the form.

THE WITNESS: If my recollection is correct, which I believe it is, the prototype described here would have been the RTP property, and Mr. Hatfield was quite enamored with it.

[547:8-548:5]

Q: Did you send these letters that are the first and third pages of Riedel Exhibit-73 to the parties indicated as addressees in the regular course of your business as vice president of operations at Motels of America in 1990?
A: I believe I did.
Q: Now, Mr. Jackson has referred you to the third paragraph and the first line of the fourth paragraph in these letters. For the record, they read, quote, Throughout 1990, we will be promoting Cricket Inns at a level they have never been marketed before. About 750,000 will be spent in direct sales, advertising, and marketing Cricket Inns. Our plans for the future are for growth, close quote.

My question is was it your understanding that the passages from these two letters that I just read reflected the plans and intentions of Motels of America as a company as of January 25th, 1990?

A: That is my — was the understanding that I had of the company's plans.

[549:4-550:3]

[Q:] In terms of what Mr. Riedel was articulating as of the January 1990 time frame, was the Motels of America company position as reflected in paragraphs 3 and 4 of these letters which I just read into the record, something that Mr. Riedel was articulating as of the January 1990 time frame?

MR. JACKSON: Object to the form.

THE WITNESS: Yes.

BY MR. HEIN:

Q: Was the Motels of America company position that is reflected in paragraphs 3 and 4 of these letters that I read into the record what Mr. Livingston was articulating as of January 1990?

MR. JACKSON: Object to the form.

THE WITNESS: I believe it was.

BY MR. HEIN:

Q: Was the Motels of America corporate position stated in paragraphs 3 and 4, which I read into the record, what Mr. Hatfield was articulating as of January 1990?

MR. JACKSON: Object to the form.

THE WITNESS: I believe it was.

[561:5-23]

Q: And if you see the article "Getting acquainted by Mark Livingston, president," is that something that Mr. Livingston prepared in or about March of 1990?

A: I believe he did.

Q: Do you recall the general — withdraw that.

You see Mr. Livingston talks about how his three months since he's joined the MOA team have been exciting and challenging.

Do you see that?

A: Yes, I do.

Q: And do you recall that that was a point of view that Mr. Livingston was expressing as of the spring of 1990?

MR. JACKSON: Object to the form.

THE WITNESS: I don't recall specifically in the spring, but I always found Mr. Livingston to be upbeat and positive.

[568:11-570:14]

Q: I want to direct you to page 466 of your transcript, Mr. Winston.

So that you have it in context, at page 466 of your deposition, Mr. Jackson had asked you a question about whether any of the information in Riedel Exhibit-134, which is a letter dated August 31, 1990, was inaccurate. And on page 466, you testified that you took exception to the third paragraph on the first page of Exhibit-134.

Do you recall that questioning?

A: Yes, I do.

Q: And you then went on to state that your recollection of the attitude of some people at Motels of America at the time is that it really wasn't underperforming, and that everything was going to be fine.

Do you see that?

A: Yes.
Q: And when you were referring to the attitude of some people at Motels of America at the time, were you referring to the period referenced in that letter, namely the end of 1989?
A: I was — in that statement I was referring to late 1989.
Q: And when you were referring to some people at Motels of America's attitude at that time, late 1989, that it really wasn't underperforming and that everything was going to be fine, to whom were you referring?
A: Primarily to Chap Riedel and Mark Livingston.
Q: What perspective or point of view was Mr. Riedel articulating on the subject of the Cricket Inns as of late 1989, as you recall it?

MR. JACKSON: Object to the form.

THE WITNESS: As I testified earlier, I don't have a specific recollection of late 1989 what his attitude was, but in general, Mr. Riedel was optimistic about the Cricket Inns.

BY MR. HEIN:

Q: What do you recall, in terms of statements or points of view, being expressed by Mr. Livingston as of late 1989 as it relates to Cricket Inns?

MR. JACKSON: Object to the form.

THE WITNESS: Again, I have no specific recollection of late 1989 points of view, but in general, Mr. Livingston was optimistic.

[575:23-577:10]

Q: Was it the Motels of America corporate position in 1989 that cash flow that could be generated from the Cricket Inn properties would not be sufficient to support debt service?

MR. JACKSON: Object to the form.

THE WITNESS: While there were individuals within Motels of America's management and ownership who were not certain there was sufficient cash flow, the company clearly believed there was by its action of executing the purchase.

BY MR. HEIN:

Q: Were there other executives at Motels of America whose opinion on the subject of the sufficiency of the cash flow to cover debt service differed from yours?
A: Yes.
Q: Who were they?
A: As I recall, it was Chap Riedel, and secondarily Guy Hatfield.
Q: Who at Motels of America had the principal responsibility for financing and acquisition activities as of 1989?
A: Chap Riedel was the lead person for that activity.
Q: And what was his position as of the summer and fall of 1989?
A: Owner.
Q: Did he have any other position with the company?
A: I can't recall.
Q: What was Mr. Hatfield's position with the company in the fall and summer of 1989?
A: I believe he was the Chairman of the Board.

[577:17-578:24]

Q: Am I correct that your opinion on the subject of the sufficiency or insufficiency of cash flow from the properties to support debt service was based more on your opinion of overall macroeconomics of supply and demand as opposed to specific condition or qualities of particular Cricket Inn properties?
A: Generally, yes.

Q: What do you mean by "overall macroeconomics of supply and demand"?
A: What I meant was that my knowledge of lodging development and lodging operating levels at the time was that demand tended to grow in increments of 1 to 5 percent annually but was relatively steadily growing, reflecting general economic conditions within a region or in the U.S. overall. Supply, however, had a tendency to grow in much more irregular increments, and that in a given market, supply could grow significantly more than 5 percent. This would then create a competitive problem for all the properties involved. It was my experience at the time that that trend was occurring in the U.S. overall, and in the southeastern United States particularly.
Q: By "supply," what are you referring to?
A: New motels and hotels.
Q: By "demand," what are you referring to?
A: The people who stay in motels and hotels.

[581:3-7]

Q: Are attempts to forecast supply and demand at any particular point in time inherently uncertain?
MR. JACKSON: Object to the form.
THE WITNESS: Yes.

[581:19-582:2]

Q: But as a general matter, in your experience, is this area of predicting the future as it relates to supply or demand or both something where at any given point in time you may find different people with different good faith beliefs?
MR. JACKSON: Object to the form.
THE WITNESS: Yes.

[585:14-586:10]

Q: And do you recall what Mr. Riedel's opinion articulated in these discussions was at the time?
A: I believe his opinion was that we were at the bottom of the curve.
Q: And what does that mean?
A: That things could only get better.
Q: And when you say "bottom of the curve," am I correct in understanding you that Mr. Riedel was articulating the point of view at the time in 1989 that occupancy had been trending down, but had reached bottom and could only get better going into the future? Is that correct?
MR. JACKSON: Object to the form.
THE WITNESS: That's what I believe I said.
BY MR. HEIN:
Q: Were there others who articulated the same point of view that Mr. Riedel did?
A: I believe Mr. Hatfield may have, but I don't recall anybody else having that belief.

[591:8-593:11]

Q: Were your views or opinions on the subject of the sufficiency of cash flow going forward to cover debt service going forward colored or affected by your position as the person who was vice president of operations?
A: To some extent, yes.
Q: As an operations person, would it be correct that you would have an inherent bias towards being skeptical of particular projected levels of performance?
A: Yes.
MR. JACKSON: Object to the form.
BY MR. HEIN:
Q: Why is that?

A: Because the operator's the one who has to produce the results and is measured against projected results.

Q: Am I correct that in terms of the internal political dynamics at Motels of America that from a personal point of view, if you signed on to Chap Riedel's projections you would be at greater risk of being criticized if Motels of America fell short than if you had not signed on to those projections?

MR. JACKSON: Object to the form.

THE WITNESS: I suppose so.

BY MR. HEIN:

Q: In your observation of Mr. Riedel, when he was articulating the optimistic point of view that you've described, was he doing so in good faith, as far as you know?

MR. JACKSON: Object to the form.

THE WITNESS: Yes.

BY MR. HEIN:

Q: You referred to Mr. Riedel, when I asked what his position was in the fall of 1989, as being one of the owners of Motels of America, and you didn't recall his precise corporate title.

Do you recall that testimony a few moments ago?

A: Yes.

Q: And what did you mean by "owner"?

A: That he was a principal who owned a percentage of a company called Motels of America.

Q: Was it your understanding as of the summer and fall of 1989 that Mr. Riedel stood to make money from his ownership position if Motels of America was successful, but potentially lose money if it were not?

A: Yeah. That would be my understanding.

[597:22-598:2]

* * *

Q. Was this opinion on your part, that Ameritech had bought air, a personal opinion?

MR. JACKSON: Object to the form.

THE WITNESS: It was my opinion, yes.

[598:10-16]

* * *

Q. At the time that you expressed this opinion about Ameritech's purchase of the appreciation interest in Portfolio III in hallway conversation, did you know anything about the nature of the investment philosophy of Ameritech pension fund?

A. No.

[599:19-601:19]

Q. At the time you expressed this opinion about Ameritech's purchase of the appreciation rights, had you personally read the fee agreement for Portfolio III that Ameritech had bought an interest in?

A. I don't believe I had.

Q. At the time you expressed that opinion, had you personally read a typed outline — or a printed outline of the terms of that fee agreement?

A. I don't believe I had.

Q. At the time you expressed that opinion, do you recall having had discussions with anyone at Motels of America on the subject of how the Motels of America fee agreement that Ameritech bought an interest in worked?

A. No, I don't believe so.
Q. Had you played any role at all in negotiating the terms of any of the three fee agreements for the Portfolios I, II or III?
A. Not that I recall, nor do I believe I did.
Q. Did you play any role in calculating the moneys due or potentially due pursuant to the terms of any of the three fee agreements for Portfolios I, II or III?
A. I have a recollection of seeing documents while employed by Motels of America regarding fee participation, but just a vague recollection.
Q. Apart from simply seeing something that someone else prepared, did you personally play any role in preparing calculations or approving calculations pursuant to the terms of any of these three fee agreements?

MR. JACKSON: Object to the Form.
THE WITNESS: No.
BY MR. HEIN:

Q. Did you have any specific responsibility at Motels of America relative to any of the three fee agreements?
A. I don't believe so.
Q. At the time you expressed the opinion that you've described about Ameritech's purchase of an interest in the third fee agreement, did you know one way or the other what the terms of the formula for distributions under that fee agreement were?
A. I don't believe so.

[605:10-607:13]

Q: Let me just back up for a moment to back to 1989. Do you recall — apart from reviewing work that others did, do you recall that you personally did any computer analysis of historical cash flows for the Cricket Inns?
A: As I didn't use a computer at the office, no.

Q: Am I correct then that because you didn't use a computer, you did not personally do any computer analysis of any sort relative to Cricket Inns, either historical or forward-looking analyses?
A: Yes, that's correct.
Q: Do you recall at any point in time in 1989 preparing any written report or written analysis of Cricket Inns' historical cash flow or projected results?
A: I don't believe I would have prepared any written report of that nature.
Q: Do you recall at any point in time communicating in writing to someone else at Motels of America your opinion on the subject of the ability of the Cricket Inns' cash flow to cover debt service?
A: No. I wouldn't have done that.
Q: Do you recall at any point in time making any written record for the files, or for your own retention, of your opinions on the subject of the ability of the Cricket Inns to cover debt service?
A: No.
Q: Do you recall any occasion prior to December 31, 1989 on which you personally told someone from Salomon that it was your personal opinion that the Cricket Inn cash flow would not be sufficient to cover debt service or that Motels of America had overpaid for the Cricket Inns?
A: I may have, but don't recall.
Q: Sitting here today, am I correct that you have no recollection of doing that?
A: That's correct.
Q: Do you recall any occasion in 1990 on which you told anyone from Salomon what your personal opinion was on the subject of the ability of the Cricket Inns' cash flow to cover debt service, or on the subject of whether Motels of America had overpaid on that acquisition?
A: I may have, but I can't recall.

Q: Am I correct that sitting here today, you have no recollection of doing that?
A: That's correct.

[757:3-15]

Q: In your experience with Mr. Riedel and Mr. Livingston at Motels of America in 1989, did they display that optimistic character that you've ascribed to both of them?
MR. JACKSON: Object to the form. He did not testify to that effect regarding Mr. Livingston, and otherwise object to the form.
THE WITNESS: Yes. Very optimistic.
BY MR. HEIN:
Q: Both of them?
A: Yeah.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Feld Deposition Exhibit 50 (K. Feld of Ameritech Memo to H. Malone of Ameritech, dated May 24, 1990)

(R. 243) (Excerpts)

May 24, 1990

Harry,

Re: Motels of America
Private Placements Held in the Dedicated Bond Fund

At your request, I attended a meeting at the NISA offices on May 21 to discuss our holdings in Motels of America. I met with Joe Gorman, Jeff Bryden, and Chuck Henry (of Salomon Brothers). My review of these private placements plus comments and recommendations are presented below.

* * *

Comments/Recommendations

My comments and recommendations focus on two aspects of these private placements: (1) managing/monitoring our investment and (2) the appropriateness of the placement as an investment in the Dedicated Bond Fund.

Managing/Monitoring: Our investment is not being managed or monitored. The investment is carried at cost and cash flows are recorded. This is not a criticism of NISA. They are not real estate analysts. The placements were not investment decisions for their managed accounts but were accommodations to Ameritech. Because Salomon kept a

piece of the first deal, there is some assurance that due diligence is maintained. However, Salomon does not have an interest in the subsequent deals.

I recommend Tom Thompson review these deals and put into place methods and procedures for management and monitoring of the investments.

* * *

[Signature]
KFF/jb

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Gorman Deposition Exhibit 308 (Investment Manager Agreement Between Ameritech and NISA, dated April 1, 1988)

(R. 243: Gorman Exh. 308) (Excerpts)

INVESTMENT MANAGER AGREEMENT

AGREEMENT, dated as of the 1st day of April, 1988 between American Information Technologies Corporation (Ameritech), a corporation organized under the laws of the State of Delaware (hereinafter referred to as the "Company"), and National Investment Services of America, Inc., a corporation organized under the laws of the State of Delaware, (hereinafter referred to as the "Manager").

The Company is authorized to appoint one or more investment managers to direct the investment of portions of the assets of the Ameritech Master Pension Trust (the "Trust Fund") created by the agreement (the "Trust Agreement") dated as of January 1, 1984 between the Company and Harris Trust and Savings Bank as trustee (the "Trustee").

NOW THEREFORE, in consideration of the terms and conditions herein contained, the parties agree as follows:

1. Appointment of Investment Manager.

(A) The Company hereby appoints the Manager, and the Manager hereby accepts such appointment, to provide investment counsel and to manage and direct the investment of that portion of the Trust Fund as determined by the Company and specified in written notice given to the Manager and to the Trustee (such portion is hereinafter referred to as "Investment Account"). The Manager agrees to perform its duties hereunder with the care, skill, prudence,

and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and consistent with the Manager's obligations and duties under the Employee Retirement Income Security Act of 1974 ("ERISA") and consistent with the Manager's obligations and duties under the Trust Agreement; provided, however, that the Manager shall not be bound by or required to take cognizance of any provision of or any amendment to the Trust Agreement unless a copy in writing of such provision or amendment is furnished to the Manager.

(B) With respect to its Investment Account, the Manager represents and warrants to the Company that: (1) It is an "Investment Manager," as that terms is defined in Section 3(38) of ERISA; (2) It is a "fiduciary," as that term is defined in Section 3(21)(A) of ERISA; (3) It is not subject to any of the disqualifications described in Section 411 of ERISA; and (4) It is a registered investment manager under the Investment Advisors Act of 1940.

2. Investment.

(A) Subject to the provisions of Section 1, the Manager is authorized and empowered in its sole discretion:

(1) To direct the Trustee to invest and reinvest the assets in the Manager's Investment Account, without distinction between principal and income, in securities suitable for the investment of retirement trust funds and subject to the authorized investments set forth in Addendum B hereto and such investment guidelines as may from time to time be communicated in writing to the Manager by the Company.

(2) Unless otherwise specified in writing by the Company, to place orders to purchase, sell, or exchange assets in its Investment Account in such markets and through such brokers as in the Manager's best judgment shall offer

the most favorable price and market for the execution of each transaction. The Company understands and agrees that, subject to the provisions of Section 28(E) of the Securities Exchange Act of 1934, the Manager may effect securities transactions which cause the Investment Account to pay an amount of commission in excess of the amount of commission another broker or dealer would have charged; provided, however, that the Manager determines in good faith that such amount of commission is reasonable in relation to the value of brokerage and research services provided by the broker or dealer utilized by the Manager, viewed in terms of either the specific transaction or the Manager's overall responsibilities to the accounts for which the Manager exercises investment discretion. The Manager agrees that the receipt and use of such services will not reduce the Manager's customary and normal research activities.

(B) Notwithstanding the foregoing of this Section 2, the Manager agrees that it will not knowingly engage in any transaction prohibited by ERISA and other applicable law.

(C) The Company acknowledges that it has the responsibility with respect to (1) the reasonable diversification of the general investment mix of the Trust Fund and (2) the funding policies, and the implementations thereof, to carry out the objectives of the plans funded through the Trust Fund.

* * *

4. General Covenants and Agreements.

(A) The Manager covenants and agrees to comply with all laws, regulations and rules applicable to it in its performance of this Agreement, including any bonding requirements.

(B) The Company shall furnish to the Manager from time to time and upon request of the Manager certified copies of the resolutions of its Board of Directors evidencing the

names, titles, and authorities of its officers and employees who are authorized to act on behalf of the Company and/or the Trust Fund with respect to the Investment Account. The Manager shall furnish to the Company and the Trustee from time to time and upon request by the Company or the Trustee the names and authorized signatures of the persons authorized to act on its behalf in the form and manner provided in the Trust Agreement.

(C) The Manager covenants and agrees that it shall defend and hold the Company and the Trustee, including the present and former employees, officers and directors of each of them, harmless from and indemnify the Company and the Trustee against any and all liability, loss, damage or expense (including attorneys fees) which either of them may incur or suffer under ERISA or other applicable laws resulting from, arising out of, relating to or in connection with the breach by the Manager of the terms of the Trust Agreement, this Agreement or any of the representations or warranties of the Manager contained herein.

* * *

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

COMPANY: AMERICAN INFORMATION TECHNOLOGIES CORPORATION

By: \s_____
Director – Investment Management

INVESTMENT MANAGER: NATIONAL INVESTMENT SERVICES OF AMERICA, INC.

By: \s_____
Title: Executive Vice President

ACKNOWLEDGED BY TRUSTEE: HARRIS TRUST AND SAVINGS BANK

By: \s_____
Title: Vice President

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Gorman Deposition Exhibit 359 (J. Yawits of NISA Letter to J. Mares of Ameritech, dated August 7, 1990)

(R. 243) (Sal. C.A. App. 726-28, at 726-27)
(Excerpts)

[NISA Letterhead]

Jess B. Yawits
Executive Vice President

August 7, 1990

Ms. Judith W. Mares
Chief Investment Officer
Ameritech
10 South Wacker Drive, 24th Floor
Chicago, IL 60606

Dear Judy:

As we discussed, I have enclosed information on the private placement activity within the dedicated bond fund. Since Joe Gorman has first hand knowledge from inception of the fund, I asked Joe to put together this information. Feel free to call either of us if you have questions.

* * *

Regards,

[signature]

* * *

Background

* * *

2) Motels of America is a San Diego-based motel owner and operator of Super 8 and other franchised motels. Salomon Bros. approached the Ameritech staff with a real estate proposal for an equity participation they had acquired as part of a financing for this group. The Ameritech staff felt the proposal, $8,565,000 in total, was too small to look at as a separate project, but too lucrative to not own. We were asked to make room for it in our dedicated account private placement category. The first purchase came in two pieces; $6,365,000 on 10/27/87, and $2,200,000 on 5/4/88.

In late 1989 we were asked to make room for another piece that would total $12,350,000. We indicated that our information on the performance of the first transaction was not complete, but what we had seen of the operating numbers and cash flows would suggest a caution about purchasing a second piece. Nonetheless another piece was negotiated and we were asked to make room for it in the dedicated portfolio. A copy of a later memo from Ken Feld is attached with more background.

* * *

Sincerely,

[signature]

* * *

AMERITECH PENSION TRUST
EIN: 36-6783461

* * *

Item 30	Yes / No

* * *

(e) Do the notes to the financial statements accompanying the accountant's opinion disclose any nonexempt transactions with parties-in-interest?	[ ] [X]
(f) Did the plan engage in any nonexempt transactions with parties-in-interest not reported in e?	[ ] [X]

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Mares Exhibit 395 (Letter from Joseph E. Gorman, President, CEO and Director of NISA, to Judith W. Mares, Chief Investment Officer of Ameritech, dated November 7, 1990)

(R. 243: Mares Exh. 395) (Excerpts)

* * *

[NISA Letterhead]

Joseph E. Gorman, CFA
President

November 7, 1990

Ms. Judith W. Mares
Chief Investment Officer
Ameritech
10 South Wacker Drive
Chicago, Illinois 60606

Dear Judy:

You have asked for more specific dates and background of the meetings leading up to the Motels of America investments. As I mentioned in our prior discussion, my calendar would not tend to distinguish among Ameritech meetings. I have attempted to add my best recollection of discussions to the dates provided by Jeff Bryden's calendar, which specifies those real estate discussions in which he participated. Clearly, it is not an exhaustive summary of the

discussions, but is a summary of what I remember with the information available at this time.

I was both surprised and alarmed by your revelation that all real estate files left by Messrs. Thompson and Phillips had been searched with no indication available that they had analyzed these transactions in any depth. As I reported to you, I have specific recollections that a file of information, including numerical analysis, was used by Mr. Thompson in our discussions.

Mr. Phillips and I clearly agreed at the time that Ameritech would provide the real estate analysis and expertise upon which we could rely, in assessing these investments for the immunized fund. It was primarily on that basis and our review of the thinking behind that work that we made these investments. That the working files have disappeared presumably surprises you as well as us, and may well have created some suspicions which are coloring our discussions. I would prefer to address directly questions which seem to be in the background.

Is it possible that Messrs. Phillips and Thompson were working in areas beyond their authority? There was absolutely no basis for suspecting that was true, as we had open contacts with nearly all parties on Ameritech's investment staff and occasional contacts with those above. Not a hint of impropriety came to us through those contacts.

Is it possible that we were all misled by Salomon Brothers? Although I don't have any basis to believe so, it was Mr. Thompson and Mr. Phillips who undertook the substantive analysis with Salomon Brothers and to whom most of the representations were made. Clearly, Mr. Thompson's files and records would be the most objective source of such information. Lacking that, his cooperation in recalling

factual representations by Salomon seems essential, if that avenue is to be pursued.

Is it possible that NISA had some interest in conjunction with Mr. Thompson, Salomon Brothers, or parties undisclosed, that influenced this decision away from the best interests of the plan participants? I can assure you in the strongest possible manner that our one interest was the plan, period.

We diligently pursued the overriding investment objective set for us by Mr. Phillips. We agreed with the theme that a small measure of an inflation sensitive growth vehicle in the dedicated bond fund could improve its match with liabilities, especially in the light of the several benefit increases which we had experienced. We discussed, disagreed, and even argued about specific investments. We finally agreed on a specific investment and its appropriateness. That investment has, as it turns out, not met our expectations. But I firmly believe that the process of making it was sound. It arose from a strong, properly motivated joint interest in working for the success of the plan.

* * *

Sincerely,

/s/
Joseph E. Gorman

* * *

Meetings and Discussions Regarding Motels of America

The discussions surrounding the use of real estate-oriented securities in the dedicated fund began sometime around mid-year 1986. Interest rates on bonds had fallen from the 11-12% range when the portfolio had been assembled, to roughly the 7-8% range.

Don Phillips began to talk with us about the interest rate outlook for the next few years and it was hard to be as optimistic concerning the expected return from bonds at current levels compared to 1984-85. He made a case for real estate as a sector providing high expected returns and asked us to explore the variety of instruments that were then emerging. We had used Mortgage Pass-Throughs, both Project Loans and discount Ginnie Mae pools, to enhance return and diversify the portfolio from inception. He asked to look beyond those to some equity participations as a way to supplement return. Sometime in this period, we pointed out that we had no official authority to invest in private placements and that specific authority needed to be given before such investments were possible. On 8/19/86, we received new guidelines allowing 15% of the fund to be invested in unrated private placements, with a maximum of 2% with any one issuer. (A copy is attached)

On 10/21/86, we were asked to attend a meeting at Ameritech's headquarters where Salomon Brothers had prepared several alternative suggestions for the dedicated fund to participate in the higher yielding real estate transactions becoming available in the market. I had the impression this meeting was arranged to follow up on a seminar or some similar presentation in which Mr. Phillips or the Ameritech staff had previously participated. Three Salomon presenters were in attendance; Mark Field, Chicago Sales Manager; Steve Manolis, Director of Real Estate for Salomon and Todd (?), a real estate analyst. Don Phillips, Ken Feld and Joan Lee were present for Ameritech and Jeff Bryden and myself for NISA.

The thrust of the argument was that the trend toward securitization had no spread into commercial real estate and this opened opportunities for pension funds to enter areas that had been the exclusive domain of life insurers. Real estate

returns led the more marketable security sectors especially in inflationary times. Historic returns from Mortgages, and real estate equity participations, leveraged and unleveraged, rated and private, were reviewed.

Other conversations and meetings regarding this issue continued through 1986, the thrust of them being how Ameritech might add a margin of inflation protection and growth potential to the dedicated fund without significantly increasing the risk of not meeting its primary requirement. NISA played the role of a skeptical potential buyer to the arguments of brokerage firms, real estate specialists and Ameritech's staff.

* * *

Sometime in 1987, we were introduced to Mr. Thompson, a new Ameritech staff member recruited to begin to implement part of Ameritech's long range plan to add directed management of assets to their fiduciary role. Around the same period, staff members in other areas were being hired to prepare for direct management of stocks, bonds, short-term cash, as well as real estate. NISA was asked to do everything we could to help in this effort and were told we would eventually turn over assets to this growing in-house staff.

Meetings to discuss how real estate could be effectively used in the immunized fund to enhance potential return and diversify the asset base continued through this period and now included the inputs of Mr. Thompson, who was both an attorney and a real estate specialist. Leading up to October, we began to focus more on the equity portion of the real estate spectrum than on the mortgage portion as a potential investment. In nearly all of the analysis we had done, the debt portion of commercial real estate seemed to offer only narrow or no margin over comparable traditional debt, which

has better trading and security characteristics. Nearly all of the excess return from real estate transactions came from either the debt holder playing an equity role or from pure equity. Both Mr. Thompson and Mr. Phillips agreed with this conclusion and the focus became smaller, equity-oriented financings that would capture the higher return potential, but allow greater diversification in the mortgage portion. We would restrict the assets we invested to smaller percentages, so as to optimize potential return against the portion of immunized fund assets invested in this more uncertain environment.

On 10/20/87 for a specific date and in the period leading up to that date, we focused on a Motels of America financing fee agreement that Salomon Brothers had negotiated for their own account. The crash of October '87 caused them to look for a buyer or partner in the participation, so their maximum capital could be focused on security trading. Jeff Bryden and myself attended a meeting with Greg White of Salomon and Tom Thompson of Ameritech, where the elements of the transaction that had been tentatively structured between their staffs were explained and questioned. Prior conversations had been held between Don Phillips and myself where Don expressed a strong desire to place this transaction in the immunized fund. He viewed it as a zero coupon income bond with strong upside and little or no downside that became available because of special circumstances and with no sales commission - exactly the sort of investment he felt we should commit a small return-oriented portion of the fund to capture. We discussed at length our limited ability to analyze the real estate, location-oriented, appraisal-oriented, portion of the investment. He indicated Tom Thompson, Ameritech's real estate specialist, had done a thorough review with Salomon and was satisfied the investment was an excellent and rare opportunity from a real estate standpoint. He asked us to go over Tom's and Salomon's

analysis and to also determine that the risk involved appeared prudent inside the larger framework of the immunized fund. Don argued that some part of the outperformance of the dedicated fund to date should be committed to real estate as exemplified by the Motels of America proposal.

In the early days of the immunized fund, we had managed the fund so as to avoid adverse calls of scheduled cash flows and made changes that pursued what we considered value in the bond market. At the end of 1986, the performance calculations indicated we had added approximately 12% above the returns of the Salomon BIG Index. If the account averaged $2 billion in size through that period, that would represent some $240 million of value. The calculations against the liability also showed substantial outperformance.

At the 10/20 meeting, we discussed and analyzed the Company, its place in the industry, its management capability, the properties involved, appraised value, operating levels compared to their history and their industry, operating statements; projections (including some work by Thompson and White on ROR if a recession reduced rates and occupancy levels); what position we occupied with relation to secured lenders and equity owners, the relative uncertainty and seasonability of cash flows, and the expected range of 25%-14% IRR. In short, it was an extended analysis of the work already done by Salomon and Ameritech in which we satisfied ourselves that the analysis was thorough, professional and had risk/return characteristics in line with the objectives of the fund.

We insisted that Salomon retain an interest in the investment, since it was stated that all parties were relying upon them to monitor the accounting, collect the excess cash flow, and to review terminal values as part of the transaction. In short, they were to play a role similar to a lead bank in a syndicated

loan and part of the transaction was to compensate them for that service. At the end of the meeting, there was agreement to the transaction with some small truing up of a price yet to be worked out between Thompson and White.

Additionally, Salomon indicated they were working with the MOA organization on additional financing that would follow roughly the same format as the first.

* * *

Sometime in the months prior to 5/5/88, Don Phillips indicated they were working an another, smaller MOA fee agreement with Salomon Brothers that would closely resemble the first. We were asked to work with Mr. Thompson an the details. Our analysis followed nearly the same format as for MOA #1 and again we became convinced the new fee agreement fit the qualifications for the Company's interest and for our standards.

* * *

From mid '88 to the end of 1989, we looked at a variety of proposals, including an extensive investigation of a private placement financing for a landfill project in Ohio.

In September of 1989, NISA presented a proposal to use a newly developed technique called "Dedicated Stock Management" to supplement the dedicated bond portfolio. Using a newly developed Markowitz Optimizer, NISA proposed incorporating equity portfolios highly correlated with interest rates into the existing portfolio to boost return with little increase in risk. We were informed a new five year asset allocation plan had been approved and that it substantially reduced the domestic equity allocation and increased the commitment to real estate and venture capital. We were informed that Salomon was working an another MOA financing and that we could expect to participate if it

was completed and met our criteria. We were also informed that approval was expected for an in-house fund that was to gather all of the private placements and venture capital investments in-house so that Ameritech staff could take full responsibility. If approval came as expected, we would transfer the investments in MOA, United Savings & Loan, and other private placements.

Late in 1989, we indicated some administrative dissatisfaction with MOA 1 & 2, in that the accounting for and payment of cash flow due to the investments had not flowed as smoothly as anticipated when the investments were made. We also questioned Salomon's continued willingness to sell their participations since the extraordinary circumstances of October '87 had cleared up, and we had been led to believe they would prefer to hold these investments, given any choice. These discussions were first with Don Phillips in a phone conversation, most likely in November, and then repeated to Mr. Thompson when he called at Mr. Phillips' request.

We asked that the discussion of the new transaction be used to question the delay in cash flows on 1 & 2, and to re-check the economics of MOA. The response was that the cash flow mix-up was caused by a series of changes in their accounting personnel to accommodate the growth and that the new Cricket Inns were the most likely to appreciate of the three programs because current occupancy rates were well below the standards of MOA.

MOA had convinced Salomon and Mr. Thompson that they expected to expand those occupancy rates, some of which were depressed because of Hurricane Hugo, with all of the cash flows leverage that such a change would bring. We were told the past due cash flows would be forthcoming as quickly as the paper could be processed and that the

economics of MOA had improved with this acquisition and because of a $10 million junior preferred issue placed in strong investors' hands. Other operating ratios were discussed and Mr. Thompson concluded the MOA 3 proposal was in line with 1 & 2. On that basis, we agreed to participate. We were to follow up with Salomon to see that they straightened out the cash flow accounting and remittance with the Company, which we eventually believed we had accomplished. I do not recall talking directly to Salomon Bros. about the economics, but rather discussed them with Mr. Phillips and Mr. Thompson.

Mixed in with these discussions was another Salomon based potential transaction that would have involved a commitment of roughly $60 million, the Nichols Company out of Kansas City. Being a totally new type of real estate financing involving complicated economic and legal negotiations, we worked with Mr. Thompson and Ameritech's attorneys well into 1990 in assessing the proposed transaction. Some of the information regarding MOA was discussed during these sessions.

In March 1990, when we were working with Salomon regarding cash flows and original projections, we expressed a need to be updated on the accounting changes, the deviations from projected cash flows, and the current economics of the three financings. A meeting was arranged 5/21/90 at NISA, where Chuck Henry, Director-Finance, Salomon Bros. Real Estate, was to present a comprehensive update. Prior to this meeting, Ken Feld had discussed with NISA the proposed transfer of private placements to an in-house Ameritech fund. We invited Ken to participate in the review and update.

At the meeting, Mr. Henry reviewed the participation and MOA's position in the motel industry, detailing the evolving demand, price, and supply conditions of business and travel

motels. He reiterated that the economics of the MOA participation captured inflation effects over an approximate five year period, in addition to the basic value in the investment. He stressed that the refinancing which was to be expected at the five year point, was the primary focus of the investment and that the owner-operator is subordinate to Ameritech's position.

Salomon had been involved with MOA since 1987. Mr. Henry reiterated his conviction that the IRR would produce its original estimated 25% level. He then went through the accounting reports and answered questions. Two location problems were discussed relating to the Hurricane effects lasting longer than expected in one location, and reduction in military budget affecting another. Salomon was also currently questioning a higher than industry administrative expense ratio and would let us know the outcome.

Mr. Henry's conclusions were that the problems to date were identified, understood, in the process of being managed, and were not expected to significantly affect the ultimate value of the investment. He stressed again, the need to look to the 1992 refinancing date for the ultimate value of the investment.

We asked for a specific review of the three financings. He said MOA #1 was essentially slightly better than breaking even, MOA 2 was making good money and MOA 3 was breaking even.

NISA asked that an extra copy of all financial reports be forwarded directly to us in the future and the meeting ended.

Joseph E. Gorman
November 7, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Phillips Deposition Exhibit 119 (Assignment of Participation Interest in Fee Agreement I)

(R. 243) (Sal. C.A. App. 481-83)

ASSIGNMENT dated as of October 28, 1987, by SALOMON BROTHERS INC (the "Assignor") to HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST (the "Assignee").

WHEREAS, the Assignor entered into a Fee Agreement dated as of July 31, 1987 (the "Agreement"), between Motels of America Inc., a Delaware corporation ("MOA"), and the Assignor, a copy of which is attached hereto as Exhibit A; and

WHEREAS, the Assignor desires to assign to the Assignee, and the Assignee desires to acquire from the Assignor, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement on the terms and conditions set forth in this Assignment.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Assignment. The Assignor hereby assigns and transfers to the Assignee and its successors and assigns, forever, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement, including but not limited to any amounts owed or accrued since July 31, 1987.

2. Consideration. In consideration of the aforesaid assignment and transfer, the Assignee agrees to pay to the Assignor, by certified or official bank check or wire transfer of immediately available funds, the sum of $6,365,000.

3. Representations and Warranties of Assignor. The Assignor represents and warrants to and agrees with the Assignee as follows:

(a) The copy of the Agreement attached hereto as Exhibit A is a true, correct and complete copy of the Agreement. The Assignor has neither amended, modified or terminated the Agreement, nor assigned or otherwise transferred any of its rights under the Agreement except pursuant to this Assignment.

(b) This Assignment has been duly authorized, executed and delivered by the Assignor.

(c) To the best of the Assignor's knowledge, there is no default under the Agreement.

4. Representations and Warranties of Assignee. The Assignee represents and warrants to and agrees with the Assignor as follows:

(a) This Assignment has been duly authorized, executed and delivered by the Assignee.

(b) The Assignee is acquiring a 95% undivided interest in all the Assignor's right, title and interest under the Agreement for its own account as principal for the purpose of investment and not with a view to the distribution or resale thereof in any manner that would violate any Federal or state securities law(s).

(c) The Assignee has conducted an independent investigation of MOA and has not relied upon any representation or warranty, express or implied, by the Assignor in connection with its acquisition of a 95% undivided interest in all the Assignor's right, title and

interest under the Agreement, except as expressly set forth in Section 3 of this Assignment.

5. Entire Agreement. This Assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

6. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

7. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the day of October, 1987.

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST,
By [Signature]
Name: A.W. Burnett
Title: Vice President

SALOMON BROTHERS INC,
By [Signature]
Name: Gregory R. White
Title: Director

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Phillips Deposition Exhibit 120 (Assignment of Participation Interest in Fee Agreement II)

(R. 243) (Sal. C.A. App. 484-86)

ASSIGNMENT dated as of April 28, 1988, by SALOMON BROTHERS INC (the "Assignor") to HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST (the "Assignee").

WHEREAS, the Assignor entered into a Fee Agreement dated as of March 10, 1988 (the "Agreement"), between Motels of America Inc., a Delaware corporation ("MOA"), and the Assignor, a copy of which is attached hereto as Exhibit A; and

WHEREAS, the Assignor desires to assign to the Assignee, and the Assignee desires to acquire from the Assignor, a 100% undivided interest in all the Assignor's right, title and interest under the Agreement on the terms and conditions set forth in this Assignment.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Assignment. The Assignor hereby assigns and transfers to the Assignee and its successors and assigns, forever, a 100% undivided interest in all the Assignor's right, title and interest under the Agreement, including but not limited to any amounts owed or accrued since March 10, 1988.

2. Consideration. In consideration of the aforesaid assignment and transfer, the Assignee agrees to pay to the Assignor, by certified or official bank check or wire transfer of immediately available funds, the sum of $2,200,000.00.

3. Representations and Warranties of Assignor. The Assignor represents and warrants to and agrees with the Assignee as follows:

(a) The copy of the Agreement attached hereto as Exhibit A is a true, correct and complete copy of the Agreement. The Assignor has neither amended, modified or terminated the Agreement, nor assigned or otherwise transferred any of its rights under the Agreement except pursuant to this Assignment.

(b) This Assignment has been duly authorized, executed and delivered by the Assignor.

(c) To the best of the Assignor's knowledge, there is no default under the Agreement.

4. Representations and Warranties of Assignee. The Assignee represents and warrants to and agrees with the Assignor as follows:

(a) This Assignment has been duly authorized, executed and delivered by the Assignee.

(b) The Assignee is acquiring a 100% undivided interest in all the Assignor's right, title and interest under the Agreement for its own account as principal for the purpose of investment and not with a view to the distribution or resale thereof in any manner that would violate any Federal or state securities law(s).

(c) The Assignee has conducted an independent investigation of MOA and has not relied upon any representation or warranty, express or implied, by the Assignor in connection with its acquisition of a 100% undivided interest in all the Assignor's right, title and

interest under the Agreement, except as expressly set forth in Section 3 of this Assignment.

5. Entire Agreement. This Assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

6. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

7. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the ___ day of April, 1988.

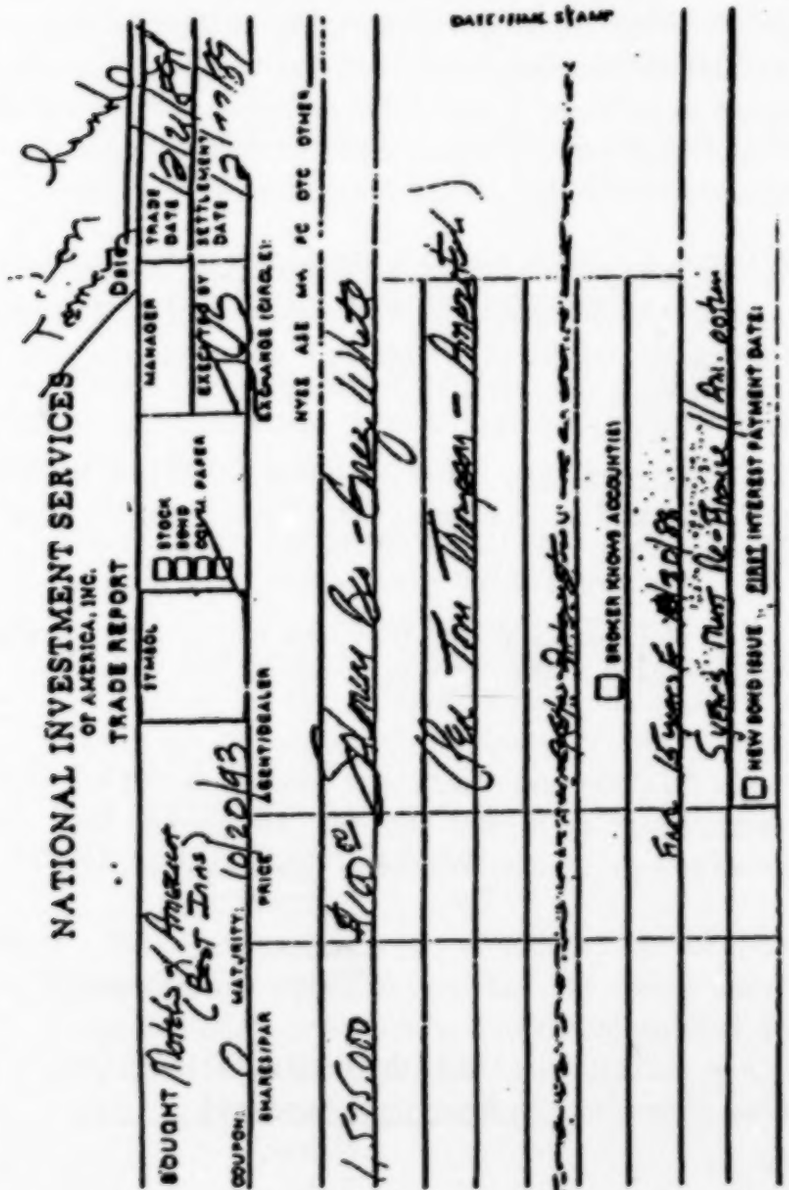
HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST,
By _____[Signature]_____
Name: A. W. Burnett
Title: Vice President

SALOMON BROTHERS INC,
By _____[Signature]_____
Name:
Title:

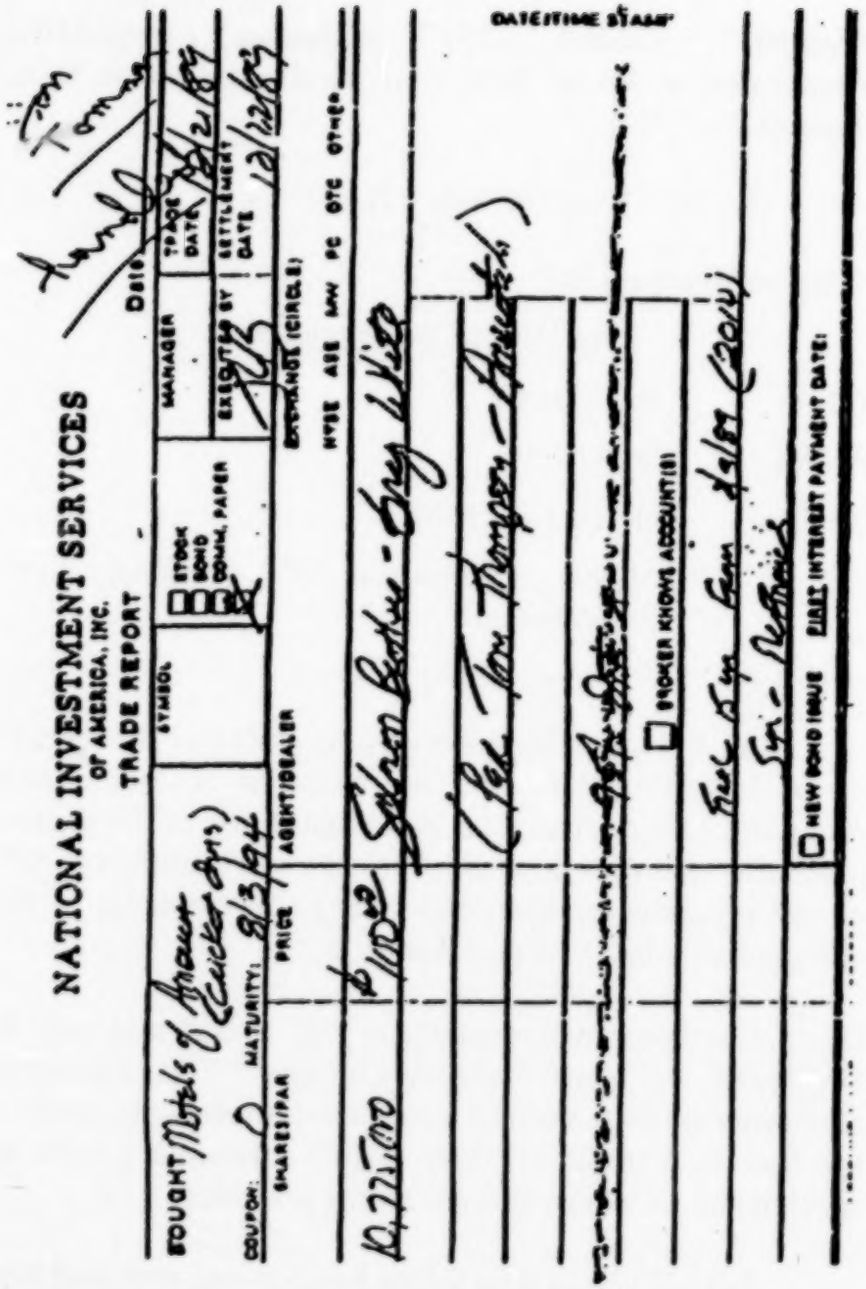
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Phillips Deposition Exhibit 134 (Trade Reports for Portfolio III and IV Participation Interest Transactions)

(R. 243) (Sal. C.A. App. 741-42) (Excerpts)


NATIONAL INVESTMENT SERVICES
OF AMERICA, INC.
TRADE REPORT
DATE/TIME STAMP
BOUGHT Motels of America (East Ins) 10/20/93
COUPON: 0 MATURITY: PRICE AGENT/DEALER
SHARES/PAR
STOCK BOND COMM. PAPER
MANAGER
EXECUTED BY
TRADE DATE 12/21/93
SETTLEMENT DATE 12/23/93
EXCHANGE (CIRCLE):
NYSE ASE MW PC OTC OTHER
BROKER KNOWS ACCOUNT(S)
NEW BOND ISSUE FIRST INTEREST PAYMENT DATE:

* * *


NATIONAL INVESTMENT SERVICES
OF AMERICA, INC.
TRADE REPORT
DATE/TIME STAMP
BOUGHT Motels of America (Excelsior Ins) 8/3/94
COUPON: 0 MATURITY: PRICE AGENT/DEALER
SHARES/PAR
STOCK BOND COMM. PAPER
MANAGER
EXECUTED BY
TRADE DATE 8/3/94
SETTLEMENT DATE 8/5/94
EXCHANGE (CIRCLE):
NYSE ASE MW PC OTC OTHER
BROKER KNOWS ACCOUNT(S)
NEW BOND ISSUE FIRST INTEREST PAYMENT DATE:

* * *

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Plaintiffs' Exhibit 251 (Salomon Inter-Office Memorandum From Will Clay to Jim Massey, Dated October 28, 1987)

(R. 243: Plaintiffs' Exh. 251)

Salomon Brothers Inc

Inter-Office Correspondence

TO: Jim Massey

FROM: Will Clay

DATE: October 28, 1987

RE: Motels of America 35% Residual Equity Participation

As a result of underwriting as principal the recently issued Motels of America debt, Salomon Brothers Realty received a 35% participation in the cash flows of the 45 hotel properties after debt service. As well we are entitled to 35% of sale proceeds (or appraised value) after payment of first mortgage debt in 5 years (at maturity).

Our basis in this equity is "$0" and it was sold for $6,365,000 by Mark Field of Chicago. This transaction represents an extraordinary sales achievement and profit to the firm as a result of Mark Field's relationship with his account and his desire to focus on our priorities.

Greg White of Real Estate Finance was involved from the beginning and was instrumental along with Mark in making this sale.

Thank you.

cc: Bill McIntosh
Patrick Dunlavy
Steve Manolis

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Thompson Deposition Exhibit 5 (Assignment of Participation Interest in Fee Agreement III)

(R. 243) (Sal. C.A. App. 487-89)

ASSIGNMENT dated as of December 22, 1989, by SALOMON BROTHERS INC (the "Assignor") to HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST (the "Assignee").

WHEREAS, the Assignor entered into a Fee Agreement dated as of August 3, 1989 (the "Agreement"), between Motels of America Inc., a Delaware corporation ("MOA"), and the Assignor, a copy of which is attached hereto as Exhibit A; and

WHEREAS, the Assignor desires to assign to the Assignee, and the Assignee desires to acquire from the Assignor, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement on the terms and conditions set forth in this Assignment.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Assignment. The Assignor hereby assigns and transfers to the Assignee and its successors and assigns, forever, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement, including but not limited to any amounts owed or accrued since August 3, 1989.

2. Consideration. In consideration of the aforesaid assignment and transfer, the Assignee agrees to pay to the Assignor, by certified or official bank check or wire transfer of immediately available funds, the sum of $10,775,000.

3. Representations and Warranties of Assignor. The Assignor represents and warrants to and agrees with the Assignee as follows:

(a) The copy of the Agreement attached hereto as Exhibit A is a true, correct and complete copy of the Agreement. The Assignor has neither amended, modified or terminated the Agreement, nor assigned or otherwise transferred any of its rights under the Agreement except pursuant to this Assignment.

(b) This Assignment has been duly authorized, executed and delivered by the Assignor.

(c) To the best of the Assignor's knowledge, there is no default under the Agreement.

4. Representations and Warranties of Assignee. The Assignee represents and warrants to and agrees with the Assignor as follows:

(a) This Assignment has been duly authorized, executed and delivered by the Assignee.

(b) The Assignee is acquiring a 95% undivided interest in all the Assignor's right, title and interest under the Agreement for its own account as principal for the purpose of investment and not with a view to the distribution or resale thereof in any manner that would violate any Federal or state securities law(s).

(c) The Assignee has conducted an independent investigation of MOA and has not relied upon any representation or warranty, express or implied, by the Assignor in connection with its acquisition of a 95% undivided interest in all the Assignor's right, title and

interest under the Agreement, except as expressly set forth in Section 9 of this Assignment.

5. Entire Agreement. This Assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

6. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

7. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the 22nd day of December, 1989.

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST,

By [Signature]
Name: Jon Toman
Title: Trust Officer

SALOMON BROTHERS INC,

By [Signature]
Name: Greg White
Title: Managing Director

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Thompson Deposition Exhibit 6 (Assignment of Participation Interest in Fee Agreement IV)

(R. 243) (Sal. C.A. App. 490-92)

ASSIGNMENT dated as of December 22, 1989, by SALOMON BROTHERS INC (the "Assignor") to HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST (the "Assignee").

WHEREAS, the Assignor entered into a Fee Agreement dated as of October 20, 1988 (the "Agreement"), between BEST INNS, INC., a Kansas corporation ("INNS"), and the Assignor, a copy of which is attached hereto as Exhibit A; and

WHEREAS, the Assignor desires to assign to the Assignee, and the Assignee desires to acquire from the Assignor, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement on the terms and conditions set forth in this Assignment.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Assignment. The Assignor hereby assigns and transfers to the Assignee and its successors and assigns, forever, a __% undivided interest in all the Assignor's right, title and interest under the Agreement, including but not limited to any amounts owed or accrued since September 30, 1989.

2. Consideration. In consideration of the aforesaid assignment and transfer, the Assignee agrees to pay to the Assignor, by certified or official bank check or wire transfer of immediately available funds, the sum of $1,575,000.

3. Representations and Warranties of Assignor. The Assignor represents and warrants to and agrees with the Assignee as follows:

(a) The copy of the Agreement attached hereto as Exhibit A is a true, correct and complete copy of the Agreement. The Assignor has neither amended, modified or terminated the Agreement, nor assigned or otherwise transferred any of its rights under the Agreement except pursuant to this Assignment.

(b) This Assignment has been duly authorized, executed and delivered by the Assignor.

(c) To the best of the Assignor's knowledge, there is no default under the Agreement.

4. Representations and Warranties of Assignee. The Assignee represents and warrants to and agrees with the Assignor as follows:

(a) This Assignment has been duly authorized, executed and delivered by the Assignee.

(b) The Assignee is acquiring a 95% undivided interest in all the Assignor's right, title and interest under the Agreement for its own account as principal for the purpose of investment and not with a view to the distribution or resale thereof in any manner that would violate any Federal or state securities law(s).

(c) The Assignee has conducted an independent investigation of INNS and has not relied upon any representation or warranty, express or implied, by the Assignor in connection with its acquisition of a 95% undivided interest in all the Assignor's right, title and

interest under the Agreement, except as expressly set forth in Section 9 of this Assignment.

5. Entire Agreement. This Assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

6. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

7. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the 22nd day of December, 1989.

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST,

By [Signature]
Name:
Title:

SALOMON BROTHERS INC,

By [Signature]
Name: Greg White
Title: Managing Director

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Thompson Deposition Exhibit 18 (J. Gorman of NISA Letter to G. White of Salomon Regarding Portfolio I Participation Interest, dated October 27, 1987)

(R. 243) (Sal. C.A. App. 758-59, at 758)

[NISA Letterhead]

Joseph B. Gorman
President

October 27, 1987

Mr. Greg White
Director
Salomon Brothers, Inc.
One New York Plaza
New York, New York 10004

Dear Mr. White:

Per your prior agreement with Ameritech, we affirm your assignment of a 95% undivided interest in Salomon Brothers, Inc. fee agreement with Motels of America, Inc. dated 7/31/87 for the Ameritech account.

As negotiated by Ameritech's Mr. Thompson, the price for the 95% undivided interest has been set at $6,365,000 with settlement and transfer of funds to take place on or after October 28, 1987.

A copy of this affirmation will be forwarded to Harris Bank and Trust, who as custodians for Ameritech will provide for a transfer of funds once satisfied with delivery of and execution of the assignment documents.

Sincerely,

/s/ Joseph B. Gorman

Joseph B. Gorman

JEG:lk

cc: Mr. Bill Burnett
Harris Bank and Trust, Chicago

Mr. Tom Thompson
Ameritech, Chicago

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Thompson Deposition Exhibit 32 (J. Bryden of NISA Letter to G. White of Salomon Regarding Portfolio II Participation Interest, dated May 5, 1988)

(R. 243) (Sal. C.A. App. 760-68, at 760)

[NISA Letterhead]

Jeffrey L. Bryden
Vice President

May 5, 1988

Mr. Greg White
Director
Salomon Brothers, Inc.
One New York Plaza
New York, New York 10004

Dear Mr. White:

Per your prior agreement with Ameritech, we affirm your assignment of a 100% undivided interest in Salomon Brothers, Inc. fee agreement with Motels of America, Inc. dated 3/10/88 for the Ameritech account.

As negotiated by Ameritech's Mr. Thompson, the price for the 100% undivided interest has been set at $2,200,000 with settlement and transfer of funds to take place on or after May 5, 1988.

A copy of this affirmation will be forwarded to Harris Bank and Trust who, as custodians for Ameritech, will provide for a transfer of funds once satisfied with delivery of and execution of the assignment documents.

Sincerely,

/s/ Jeffrey L. Bryden

Jeffrey L. Bryden, CFA

JLB:crs

cc: Mr. Bill Burnett
Harris Bank and Trust, Chicago

Mr. Tom Thompson
Ameritech, Chicago

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Thompson Deposition Exhibit 36 (Letter Notifying MOA of Assignment of Participation Interest in Fee Agreement II)

(R. 243)

April 28, 1998

Motels of America Inc.
6153 Fairmount Avenue
San Diego, CA 92110

Attention: Mr. Guy E. Hatfield

Dear Sirs:

As per the Assignment dated as of April 28, 1988 (the "Assignment"), by Salomon Brothers Inc (the "Assignor") to Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust (the "Assignee") (a copy of which is attached hereto as Exhibit A), the Assignor has heretofore assigned and transferred to the Assignee and its successors and assigns a 100% undivided interest in all the Assignor's right, title and interest under that certain Fee Agreement dated as of March 10, 1988 (the "Fee Agreement"), between you and the Assignor, including but not limited to any amounts owed or accrued since March 10, 1988. A copy of the Fee Agreement is attached to the Assignment. The Assignment was executed pursuant to paragraph 6 of the Fee Agreement.

You hereby are notified by the Assignor that the Fees (as defined in the Assignment) payable to the Assignor pursuant

to the Fee Agreement shall hereafter be paid 100% to the Assignee by wire transfer of immediately available funds to the following account:

Harris Trust and Savings Bank
for credit to Ameritech Pension Trust
Account Number 70707
Attention: Mr. A. William Burnett

Pursuant to paragraph 11 of the Fee Agreement, you are hereby directed to send all documentation, including without limitation notices, financial statements, requests, etc. (including without limitation all copies of itemized statements pursuant to paragraph 3 of the Fee Agreement), to each of the following:

To the Assignor, at:

Salomon Brothers Inc
Two New York Plaza
New York, NY 10004

Attention: Mr. Charles S. Henry

To the Assignee, at:

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60603
for the attention of Mr. A. William Burnett,
as Trustee for Ameritech Pension Trust

with copies to:

Mr. L.B. Thompson
Ameritech
Director Real Estate Investments

10 South Wacker Drive – 24th floor
Chicago, Illinois 60606

Very truly yours,

SALOMON BROTHERS INC.

By [Signature]
Name: Gregory A. White
Title: Managing Director

Agreed to and acknowledged as
of the date set forth above:

MOTELS OF AMERICA INC.,

By_____
Name:
Title:

HARRIS TRUST AND SAVINGS BANK,
AS TRUSTEE FOR THE AMERITECH PENSION TRUST

By [Signature]
Name: A. W. Burnett
Title: Vice President

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Thompson Deposition Exhibit 37 (Letter Notifying MOA of Assignment of Participation Interest in Fee Agreement III)

(R. 243)

December 22, 1989

Motels of America Inc.
6153 Fairmount Avenue
San Diego, CA 92110

Attention: Mr. Guy E. Hatfield

Dear Sirs:

As per the Assignment dated as of December 22, 1989 (the "Assignment"), by Salomon Brothers Inc (the "Assignor") to Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust (the "Assignee") (a copy of which is attached hereto as Exhibit A), the Assignor has heretofore assigned and transferred to the Assignee and its successors and assigns a 95% undivided interest in all the Assignor's right, title and interest under that certain Fee Agreement dated as of August 3, 1989 (the "Fee Agreement"), between you and the Assignor, including but not limited to any amounts owed or accrued since August 3, 1989. A copy of the Fee Agreement is attached to the Assignment. The Assignment was executed pursuant to paragraph 13 of the Fee Agreement.

You hereby are notified by the Assignor that the Fees (as defined in the Assignment) payable to the Assignor pursuant to the Fee Agreement shall hereafter be paid 95% to the Assignee by wire transfer of immediately available funds to the following account:

Harris Trust and Savings Bank
for credit to Ameritech Pension Trust
Account Number 70707
Attention: Mr. A. William Burnett

The remaining 5% of the Fees payable to the Assignor pursuant to the Fee Agreement shall continue to be payable to the Assignor in accordance with subparagraphs 3, 4 and 5 of the Fee Agreement.

Pursuant to paragraph 18 of the Fee Agreement, you are hereby directed to send all documentation, including without limitation notices, financial statements, requests, etc. (including without limitation all copies of itemized statements pursuant to paragraph 9 of the Fee Agreement), to each of the following:

To the Assignor, at:

Salomon Brothers Inc
Two New York Plaza
New York, NY 10004

Attention: Mr. Gregory A. White
Mr. Charles S. Henry

To the Assignee, at:

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60603

for the attention of Mr. A. William Burnett,
as Trustee for Ameritech Pension Trust

with copies to:

Mr. L.B. Thompson
Ameritech
Director Real Estate Investments
10 South Wacker Drive – 24th floor
Chicago, Illinois 60606

Mr. Jeffrey L. Bryden
National Investment Services of America, Inc.
815 East Mason Street
Suite 1501
P.O. Box 2143
Milwaukee, Wisconsin 53201

Very truly yours,

SALOMON BROTHERS INC.

By [Signature]
Name: Gregory A. White
Title: Managing Director

Agreed to and acknowledged as
of the date set forth above:

MOTELS OF AMERICA INC.,

By [Signature]
Name: Mark T. Livingston
Title: President/CEO

HARRIS TRUST AND SAVINGS BANK, not individually, but solely
AS TRUSTEE FOR THE AMERITECH PENSION TRUST

By [Signature]
Name: Jon K. Toman
Title: Trust Officer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Thompson Deposition Exhibit 39 (Letter Notifying MOA of Assignment of Participation Interest in Fee Agreement I)

(R. 243)

October 28, 1987

Motels of America Inc.
6153 Fairmount Avenue
San Diego, California 92110

Attention: Mr. Guy E. Hatfield

Dear Sirs:

As per the Assignment dated as of October 28, 1987 (the "Assignment"), by Salomon Brothers Inc (the "Assignor") to Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust (the "Assignee") (a copy of which is attached hereto as Exhibit A), the Assignor has heretofore assigned and transferred to the Assignee and its successors and assigns a 95% undivided interest in all the Assignor's right, title and interest under that certain Fee Agreement dated as of July 31, 1987 (the "Fee Agreement"), between you and the Assignor, including but not limited to any amounts owed or accrued since July 31, 1987. A copy of the Fee Agreement is attached to the Assignment. The Assignment was executed pursuant to paragraph 6 of the Fee Agreement.

You hereby are notified by the Assignor that the Fees (as defined in the Assignment) payable to the Assignor

pursuant to the Fee Agreement shall hereafter be paid 95% to the Assignee by wire transfer of immediately available funds to the following account:

Harris Trust and Savings Bank
for credit to Ameritech Pension Trust
Account Number 70707
Attention: Mr. A. William Burnett

The remaining 5% of the Fees payable to the Assignor pursuant to the Fee Agreement shall continue to be payable to the Assignor in accordance with subparagraph 1(i) of the Fee Agreement.

Pursuant to paragraph 11 of the Fee Agreement, you are hereby directed to send all documentation, including without limitation notices, financial statements, requests, etc. (including without limitation all copies of itemized statements pursuant to paragraph 3 of the Fee Agreement), to each of the following:

To the Assignor, at:

Salomon Brothers Inc
Two New York Plaza
New York, NY 10004

Attention: Mr. Charles S. Henry

To the Assignee, at:

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60603
for the attention of: Mr. A. William Burnett,
as Trustee for Ameritech Pension Trust

with a copy to:

Mr. L.B. Thompson
Ameritech
Director Real Estate Investments
10 South Wacker Drive – 24th floor
Chicago, Illinois 60606

Very truly yours,

SALOMON BROTHERS INC.

By [Signature]
Name: Gregory A. White
Title: Director

Agreed to and acknowledged as
of the date set forth above:

MOTELS OF AMERICA, INC.

By [Signature]
Name:
Title:

HARRIS TRUST AND SAVINGS BANK,
AS TRUSTEE FOR THE AMERITECH PENSION TRUST

By [Signature]
Name: A.W. Burnett
Title: Vice President

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Thompson Deposition Exhibit 230 (Letter Notifying Best Inns of Assignment of Participation Interest in Fee Agreement IV)

(R. 243)

December 22, 1989

Best Inns, Inc.
7101 College Boulevard (Suite 2100)
Overland Park, Kansas

Attention: Mr. Gregory A. Miller

Dear Sirs:

As per the Assignment dated as of December 22, 1989 (the "Assignment"), by Salomon Brothers Inc (the "Assignor") to Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust (the "Assignee") (a copy of which is attached hereto as Exhibit A), the Assignor has heretofore assigned and transferred to the Assignee and its successors and assigns a 95% undivided interest in all the Assignor's right, title and interest under that certain Fee Agreement dated as of October 20, 1988 (the "Fee Agreement"), between you and the Assignor, including but not limited to any amounts owed or accrued since October 1, 1989. A copy of the Fee Agreement is attached to the Assignment. The Assignment was executed pursuant to paragraph 12 of the Fee Agreement.

You hereby are notified by the Assignor that the Fees (as defined in the Assignment) payable to the Assignor pursuant to the Fee Agreement shall hereafter be paid 95% to the Assignee by wire transfer of immediately available funds to the following account:

Harris Trust and Savings Bank
for credit to Ameritech Pension Trust
Account Number 70707
Attention: Mr. A. William Burnett

The remaining 5% of the Fees payable to the Assignor pursuant to the Fee Agreement shall continue to be payable to the Assignor in accordance with subparagraphs 3, 4 and 5 of the Fee Agreement.

Pursuant to paragraph 17 of the Fee Agreement, you are hereby directed to send all documentation, including without limitation notices, financial statements, requests, etc. (including without limitation all copies of itemized statements pursuant to paragraph 9 of the Fee Agreement), to each of the following:

To the Assignor, at:

Salomon Brothers Inc
Two New York Plaza
New York, NY 10004

Attention: Mr. Gregory A. White
Mr. Kevin Shields

To the Assignee, at:

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60603

for the attention of: Mr. A. William Burnett,
As Trustee for Ameritech Pension Trust

with copies to:

Mr. L.B. Thompson
Ameritech
Director Real Estate Investments
10 South Wacker Drive – 24th floor
Chicago, IL 60606

Mr. Jeffrey L. Bryden
National Investment Services of America, Inc.
815 East Mason Street
Suite 1501
P.O. Box 2143
Milwaukee, Wisconsin 53201

Very truly yours,

SALOMON BROTHERS INC.

By [Signature]
Name: Gregory A. White
Title: Managing Director

Agreed to and acknowledged as
of the date set forth above:

BEST INNS, INC.

By [Signature]
Name: Greg Miller
Title: President

HARRIS TRUST AND SAVINGS BANK, NOT
INDIVIDUALLY, BUT SOLELY
AS TRUSTEE FOR THE AMERITECH PENSION TRUST

By [Signature]
Name: Jon K. Toman
Title: Trust Officer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Charles C. Jackson, Counsel to Plaintiffs, Letter to Peter C. Hein, Counsel to Defendants, dated May 2, 1994

(R. 243) (Sal. C.A. App. 790-93, at 790-91) (Excerpts)

[Letterhead of Seyfarth, Shaw, Fairweather & Geraldson]

* * *

This is in response to your letters of March 21, 1994 to Sandy Walton and me regarding various evidentiary issues, and also to provide you with copies of our responses to your discovery requests and APT's privilege log.

* * *

B. Issue Of Joint Privilege As Between NISA And APT.

* * *

By the summer of 1991, NISA and APT were cooperating regarding the settlement of any claims in the Motels of America bankruptcy. By August of 1991, and probably earlier, APT and NISA were jointly cooperating with respect to filing litigation against Salomon Brothers.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Salomon's 12N Statement in Response to Plaintiffs' 12(m) Statement, dated July 11, 1995

(R. 143) (*See* Salomon's Reply Appendix in the Court of Appeals, at RA329, RA335, RA449-50, RA461, RA501) (Excerpts)

* * *

Salomon's Response to ¶ 186:

* * *

(b) Object on the grounds that Winston's personal views are in any event inadmissible in that they constitute personal opinions without any proper foundation:

* * *

Salomon's Response to ¶ 187:

* * *

(b) Object on the grounds that Livingston's personal views are in any event inadmissible in that they constitute personal opinions without any proper foundation:

* * *

Salomon's Response to ¶ 244:

* * *

(b) Object to Mares Ex. 395, a November 7, 1990 letter to Mares with attachment.

(i) As set forth in Defendants' Memorandum of Law in Support of Objections to Evidentiary Matters Offered in Plaintiffs' 12(M) statement, Point III, Mares Ex. 395 is hearsay and there is no available exemption.

* * *

SALOMON 12N PART II

* * *

g. There was no agreement by Salomon to monitor the participation interests on behalf of APT.

410. Salomon objects to plaintiffs' assertion that there was some agreement by Salomon to monitor on behalf of APT on the grounds that no such agreement to monitor was included in the Assignments; the Assignments expressly recited in Section 5 that they "constitute[ ] the entire agreement between the parties with respect to the subject matter hereof and supersede[ ] all other prior agreements and understandings, both written and oral"; and thus any supposed oral agreement is barred by the parol evidence rule. See Defendants' Memorandum of Law in Support of Objections to Evidentiary Matters Offered in Plaintiffs' 12(m) Statement Point I.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Composite Document Which Includes (1) Defendants' 12(m) Statement, (2) Plaintiffs' 12N Responses Thereto, and (3) Defendants' Objections to Certain Evidence Contained in Plaintiffs' 12N Responses and Replies to Plaintiffs' 12N(3)(B) Assertions

(R.173, 176) (Sal. C.A. App. 343-410, at 354) (Excerpts)

* * *

Salomon 12(m) Statement ¶ 4

4. Ameritech's pension plans are noncontributory, defined benefit plans, and thus no Ameritech employee ever contributed any money to these plans. Phillips Dep. 253(22)-254(8). Ameritech is obliged to pay fixed benefits irrespective of the investment performance of APT, and any losses suffered by APT based on poor investment performance are borne by Ameritech, not its retirees. Phillips Dep. 256(l)-258(4), 259(17-21); Feld Dep. 407(3)-408(7); Edwardson Dep. 133(23)-136(11). Specifically, any losses which APT may have suffered with respect to the participation interest investments did not cost any Ameritech employee or retiree any money. Phillips Dep. 259(17-21).

Plaintiffs' 12N(3)(a) Response to ¶ 4

According to Salomon (Stmt. p. 1), the noncontributory nature of the Ameritech Pension Plan and Ameritech Management Pension Plan, and Ameritech's obligation to contribute and bear losses "are not themselves essential to the grounds on which Salomon seeks summary judgment." Answering further, admit that Salomon accurately reflects the

record, but deny that the noncontributory nature of the Ameritech Pension Plan and Ameritech Management Pension Plan, and Ameritech's obligation to contribute and bear losses, are relevant or material to Salomon's motion or obligations under ERISA or State law. Whether the Pension Trust could afford to be swindled is not relevant.

Complaint in *Spink* v. *Lockheed Corp.*, Case No. 92-800 SVW (C.D. Cal.)

(Included in R. 197) (Sal. C.A. App. 275-284b, at 276b-79b, 280a-82a, 283b-84b) (Excerpts)

NATURE OF THE ACTION

1. This is a class action brought by PAUL L. SPINK (hereafter "Spink" or "plaintiff") against LOCKHEED CORPORATION and various divisions, departments, affiliates and/or subsidiaries thereof, including but not limited to LOCKHEED AERONAUTICAL SYSTEMS COMPANY, LOCKHEED CALIFORNIA COMPANY, and/or LOCKHEED ADVANCED DEVELOPMENT PROJECTS (hereinafter collectively referred to as "Lockheed"), and related defendants, pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, and the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*

2. Spink brings claims under ERISA for himself and on behalf of similarly situated persons to enforce the terms of Lockheed's pension plan, to redress violations of the provisions of ERISA, and to remedy breaches of fiduciary duty by the plan administrators. Under ERISA, Spink alleges that defendants have violated and continue to violate ERISA by denying full pension benefits to him and a class of similarly situated persons because of their age, and by breaching their fiduciary duties to Spink and the plaintiff class by using millions of dollars of pension plan funds to obtain a release of various employment related claims of employees against the plan sponsor concurrently with the massive layoff of the plan sponsor's employees, all to the benefit of Lockheed, not the Plan.

* * *

FACTS COMMON TO ALL CAUSES OF ACTION

* * *

8. Plaintiff Paul L. Spink ("Spink") was, during periods of time from in or about 1939 through June 30, 1990, an employee of various divisions, departments, affiliates, and/or subsidiaries of defendant Lockheed Corporation. Plaintiff is a participant in the Lockheed Retirement Plan For Certain Salaried Employees ("Plan"), within the meaning of Section 3(7) of ERISA, 29 U.S.C. § 1002(7), and is currently receiving benefits from the Plan.

9. Defendant Lockheed Corporation is a Delaware corporation doing business as an aerospace manufacturer in the State of California and throughout the United States, under its own name and under the name of its various divisions, departments, affiliates and/or subsidiaries, including but not limited to LOCKHEED AERONAUTICAL SYSTEMS COMPANY, LOCKHEED CALIFORNIA COMPANY, and/or LOCKHEED ADVANCED DEVELOPMENT PROJECTS (hereinafter collectively referred to as "Lockheed"). Lockheed is an "employer" engaged in commerce and is the Plan Sponsor, as that term is used in ERISA, and is an "employer" within the meaning of and subject to the provisions of the ADEA. As the Plan Sponsor, Lockheed was responsible for the appointment and retention of individuals to the Retirement Plan committee to administer the Plan, among other things. In addition, Defendant Lockheed was responsible at all material times for interpreting and implementing the terms of the Plan, including ensuring the Plan complied with all applicable federal and state laws. Defendant Lockheed had actual control of Plan assets. Therefore, Defendant Lockheed was at all material times a "fiduciary" within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

Defendant Lockheed is also a "party in interest" within the meaning of Section 3(14) of ERISA, 29 U.S.C. § 1002(14).

10. Defendant Daniel M. Tellep ("Tellep") was at all material times Chairperson of the Board and Chief Executive Officer of Defendant Lockheed. Tellep was at all material times a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21)(A), 29 U.S.C. §§ 1002(14) and 1002(21)(A) with respect to the Plan.

11. Defendant Robert A. Fuhrman ("Fuhrman") was at all material times through April 1, 1990, Vice Chairperson of the Board and Chief Operating Officer of Defendant Lockheed. Fuhrman was at all material times through April 1, 1990, a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21)(A), 29 U.S.C. §§ 1002(14) and 1002(21)(A) with respect to the Plan.

12. Defendant Vincent N. Marafino ("Marafino") was at all material times Chairperson of the Board and Chief Financial and Administrative Officer of Defendant Lockheed. Marafino was at all material times a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21)(A), 29 U.S.C. §§ 1002(14) and 1002(21)(A) with respect to the Plan.

13. Defendant K.H. Anderson ("Anderson") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Anderson was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

14. Defendant L.J. Barnard ("Barnard") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Barnard was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

15. Defendant R.W. Berry ("Berry") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. R. W. Berry was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

16. Defendant P.N. Braunagel ("Braunagel") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Braunagel was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

17. Defendant D.L. Bronco ("Bronco") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Bronco was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

18. Defendant R.H. Northcutt ("Northcutt") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Northcutt was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

19. Defendant W.E. Skowronski ("Skowronski") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Skowronski was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

20. Defendant A.G. Van Shaick ("Van Shaick") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Van Shaick was at all material times a

"fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

21. Defendant W.T. Vincent ("Vincent") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Vincent was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002 (21)(A) with respect to the Plan.

22. At all material times, Bankers Trust Company ("Bankers") was the Trustee and Custodian of the assets of the Plan. Bankers holds the assets of the Plan and performs as trustee pursuant to the Plan's Trust Agreement.

* * *

24. The Plan, which has been in effect for many years, was restated effective August 5. 1985, and has been amended from time to time. The Plan is a defined benefit non-contributory plan that covers substantially all salaried employees of the participating companies, which include Defendant Lockheed Corporation, its departments, divisions, affiliates and subsidiaries. Employees who are eligible to participate in the Plan receive benefits upon their retirement, death, or disability in accordance with the terms of the Plan. Upon information and belief, during the relevant period the Plan had in excess of $1 billion surplus of assets above those needed for funding requirements under the Plan.

25. According to the Plan's terms, the Plan is governed by federal law, the Trust Agreement and the Plan document itself. The Plan is administered by the Retirement Plan Committee ("Committee"), which Committee has the responsibility and legal authority to control the Plan's operation and administration in accordance with the terms of the Plan Document and Trust Agreement, including the exercise of all fiduciary functions provided for in either the Plan Document or the Trust Agreement as are necessary to

the Plan's administration and operation. By resolution of its Board of Directors, the plan sponsor, Defendant Lockheed had authority to appoint and/or approve the Committee's membership.

* * *

COUNT III
BREACH OF FIDUCIARY DUTY UNDER ERISA SECTION 404 AND 406 OF ERISA, 29 U.S.C. §§ 1104 AND 1106
(Class Claim)

55. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, inclusive, as though fully set forth herein.

56. Spink brings this claim on his own behalf and on behalf of a class of similarly situated persons under Section 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3).

57. In 1989 and early 1990, Lockheed's management engaged in a contest for control of the corporation with Harold Simmons and NL Industries, Inc. ("Simmons/NLI"), which resulted ultimately in both Lockheed and Simmons/NLI spending hundreds of millions of dollar in a takeover battle and an attendant proxy fight. During this struggle for the corporate control of Lockheed, among other misconduct, Lockheed management and Plan fiduciaries manipulated various Plan assets for their own benefit and for the benefit of Lockheed in violation of their duties under the Plan Document, Trust Agreement and ERISA not to use or divert Plan assets for any purpose other than for the sole and exclusive benefit of Plan participants and their beneficiaries. Such actions were taken with the knowledge and consent of defendant Lockheed in violation of its duties as Plan Sponsor to see that Plan assets are used solely in the interests of Plan participants and their beneficiaries.

58. After a lengthy and heated battle and in response to continued fears of takeover efforts by Simmons/NLI, defendant Lockheed undertook a major reorganization at its Board of Directors meeting on or about May 8, 1990, allegedly in an effort to make its aeronautical systems business more competitive and profitable by streamlining its operations. One portion of this streamlining involved consolidating the company's Southern California operations in Georgia, which move involved nearly total elimination of defendant Lockheed's Burbank facilities over the next several years. At the time of the May Board meeting, defendant Lockheed estimated that close to 3000 employees, most of whom were then located at the Burbank facility, would be laid off by late June, 1990.

59. In order to carry out these plans, defendant Lockheed passed Plan amendments at the May 8 Board of Directors meeting, which amendments provided for a Special Retirement Opportunity ("SRO") and a 1990 Voluntary Retirement Program ("VRP"). These options were then made available to certain groups of individuals until June 30, 1990. To be eligible, a Lockheed employee had to hold a salaried position within one of the relevant groups and be on the active payroll or on leave between May 8 and June 30, 1990.

60. The SRO and VRP options offered eligible employees incentives in the form of increased benefits upon retirement to take certain specified employment-related actions. Except for certain identified individuals whose continued employment was deemed important in meeting defendant Lockheed's operational requirements, virtually all persons eligible for normal or early retirement under the existing Plan were given opportunities to participate in the SRO and VRP. However, in exchange for the exercise of this early retirement option, the eligible employee/participant was required to release and discharge the defendant Lockheed from almost all claims arising out of, or in any way

related to, her/his employment with defendant Lockheed or the termination of that employment and to refrain from participating in any lawsuit to assert any such claims. Additionally, the company required eligible employees and participants to indemnify and hold defendant Lockheed harmless from all loss or damage, including attorney's fees, arising out of the breach of any release. The benefits paid under the SRO and VRP were and continue to be funded almost entirely by surplus Plan assets, assets which are currently held in trust for the sole and exclusive benefit of the Plan's participants and beneficiaries. Thus, the Plan's assets were used at least in part by defendant Lockheed to relieve itself of various liabilities or potential liabilities to thousands of its employees.

61. Defendants Lockheed, Tellep, Fuhrman and Marafino violated ERISA by adopting the May 8, 1990 amendments which provided for the SRO and VRP options in that this action misused Plan assets by manipulating those assets for the benefit of defendant Lockheed. Defendant Lockheed failed to discharge its duties as Plan Sponsor solely in the interest of participants and their beneficiaries in violation of the provisions of the Plan, Trust Agreement, and ERISA, all of which prohibit the use or diversion of any Plan funds for any purpose other than for the sole and exclusive benefit of Plan participants and their beneficiaries.

62. Defendants Anderson, Barnard, Berry, Braunagel, Bronco, Northcutt, Skowronski, Van Shaick, and Vincent knew or should have known that the SRO and VRP options adopted as Plan amendments on May 8, 1990, constituted a use of Plan assets for Defendant Lockheed. Said individual defendants were required to act so as to promptly terminate the misuse of surplus Plan assets by Defendant Lockheed but failed to do so. Instead, acting as Plan fiduciaries, said individual defendants implemented these Plan amendments by requiring participants to execute Settlement Agreements

and Releases of claims against Defendant Lockheed to obtain the SRO and VRP benefits outlined above.

63. Each of the defendants, who participated in adopting, or were acting as fiduciaries with respect to the Plan in implementing the SRO and VRP amendments to the Plan, which misused surplus Plan assets by manipulating those assets for the benefit of Defendant Lockheed, violated ERISA in the following respects:

a. By failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries of the Plan and by failing to discharge their duties for the exclusive purpose of providing benefits to Plan participants and their beneficiaries in violation of ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1);

b. By failing to discharge their duties with respect to the Plan solely in the interest of the Plan participants and beneficiaries with the care, skill, prudence and diligence under circumstances that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise with the character and aims like those of the Plan in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

c. By failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries in violation of the Provisions in the Plan and Trust Agreement prohibiting use or diversion of any Plan funds for any purpose other than for the sole and exclusive benefit of the Plan participants and beneficiaries in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); and

d. By causing the Plan to engage in a transaction which they knew or should have known constituted a direct or indirect use of the Plan for the benefit of a party in interest (Defendant Lockheed) in violation of ERISA §§ 406(a) and (b), 29 U.S.C. §§ 1106 (a) and (b).

64. Defendants Lockheed, Tellep, Fuhrman and Marafino, by virtue of their status as a parties in interest and/or fiduciaries with respect to the Plan under ERISA, Sections 3(14) (21)(A), 29 U.S.C. 1002(14)(21)(A), and any other of the defendants who are found liable for breaches of duty during their tenure as Plan fiduciaries, are personally liable to make restitution to the Plan for the value of the use of Plan assets resulting from any such breach and to restore to the Plan any profits which they made through the use of Plan assets, and are subject to any such other equitable or remedial relief as this Court deems appropriate, all in accordance with ERISA, Sections 409(a) and 502(a)(2) and (3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (3), as well as pursuant to the Plan document and Trust Agreement.

* * *

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment for him and the class members he represents, granting the following relief:

* * *

a. An order requiring restitution by defendants to the Plan of the value of their use of surplus Plan assets to the extent of the value of their use of such assets, and irrevocably

transferring said amount to the Plan (*i.e.*, prohibiting its reversion to the Plan Sponsor) for the exclusive benefit of the Plan's participants and beneficiaries.

b. An order requiring defendants, and each of them, to personally restore to the Plan all profits made by them through the use of Plan assets.

* * *

8. An award of monetary damages to restore Spink and all affected class members to the position which they would have held but for the defendants' contractual and statutory violations as alleged herein.

* * *

10. An award of attorneys' fees, litigation expenses, prejudgment interest, and any other appropriate relief.

* * *

STATUTORY PROVISIONS

ERISA TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE A—GENERAL PROVISIONS

1. ERISA § 3, 29 U.S.C. § 1002, provides in part as follows:

§ 3. Definitions

For purposes of this title:

* * *

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.[,]

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 [26 U.S.C. § 501(c)(22)] is permitted to make payments under section 4223 [29 U.S.C. § 1403] shall be treated as a party in interest with respect to such trust.

* * *

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 U.S.C. § 1105(c)(1)(B)].

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company

registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

* * *

ERISA TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B—REGULATORY PROVISIONS
PART 4—FIDUCIARY RESPONSIBILITY

2. ERISA § 404(a), 29 U.S.C. § 1104(a), provides as follows:

§404. Fiduciary duties.

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d) [29 U.S.C. § 1103(c) and (d)], 4042 [29 U.S.C. § 1342], and 4044 [29 U.S.C. § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents, and instruments are consistent with the provisions of this title and title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 U.S.C. § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 U.S.C. § 1107(d)(4) and (5)]).

3. ERISA § 405, 29 U.S.C. § 1105, provides as follows:

§ 405. Liability for breach by co-fiduciary

(a) Circumstances giving to liability.

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [29 U.S.C. § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees.

(1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2) [29 U.S.C. § 1103(a)(1) and (2)], if the assets of a plan are held by two or more trustees --

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 403(a)(1) [29 U.S.C. § 1103(a)(1)].

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities.

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that --

(A) the named fiduciary violated section 404(a)(1) [29 U.S.C. §1104(a)(1)]--

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3) [29 U.S.C. § 1102(c)(3)].

(d) Investment managers.

(1) If an investment manager or managers have been appointed under section 402(c)(3) [29 U.S.C. § 1102(c)(3)], then, notwithstanding subsections (a)(2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

4. ERISA § 406, 29 U.S.C. § 1106, provides as follows:

§ 406. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 408 [29 U.S.C. § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 U.S.C. § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 U.S.C. § 1107(a)].

(b) Transactions between plan and fiduciary.

A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest.

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

5. ERISA § 408, 29 U.S.C. § 1108, provides in part as follows:

§ 408. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a) [29 U.S.C. §§ 1106, 1107(a)]. Action under this subsection may be taken only after consultation and

coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) or 407(a) [29 U.S.C. §§ 1106(a), 1107(a)], the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) [29 U.S.C. § 1106(b)] unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from 29 U.S.C. § 1106 prohibitions.

The prohibitions provided in section 406 [29 U.S.C. § 1106] shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis,

(B) are not made available to highly compensated employees (within the meaning of section 414(q) of the Internal Revenue Code of 1986) [26 U.S.C. § 414(q)] in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of the Internal Revenue Code of 1986 [26 U.S.C. § 414(u)(4)].

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 407(d)(6) [29 U.S.C. § 1107(d)(6)], if --

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of

qualifying employer securities (as defined in section 407(d)(5) [29 U.S.C. § 1107(d)(5)].

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if --

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is -

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations

written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if -

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such

guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if -

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank,

trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of this Act (relating to allocation of assets) [29 U.S.C. § 1344].

(10) Any transaction required or permitted under part 1 of subtitle E of title IV [29 U.S.C. §§ 1381 *et seq.*].

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 [29 U.S.C. § 1411].

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if -

(A) The requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) On the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 407(d)(5) [29 U.S.C. § 1107(d)(5)] as then in effect), and

(C) Such stock does not constitute a qualifying employer security (as defined in section 407(d)(5) [29 U.S.C. § 1107(d)(5)] as in effect at the time of the sale).

(13) Any transfer in a taxable year beginning before January 1, 2001, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of the Internal Revenue Code of 1986 [26 U.S.C. § 420] (as in effect on January 1, 1995).

(c) Fiduciary benefits and compensation not prohibited by 29 U.S.C. § 1106.

Nothing in section 406 [29 U.S.C. § 1106] shall be construed to prohibit any fiduciary from -

(1) Receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) Receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan,

except for reimbursement of expenses properly and actually incurred; or

(3) Serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

* * *

6. ERISA § 409, 29 U.S.C. § 1109, provides as follows:

§ 409. Liability for breach of fiduciary duty.

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 U.S.C. § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

7. ERISA § 410, 29 U.S.C. § 1110, provides in part as follows:

§ 410. Exculpatory provisions; insurance

(a) Except as provided in §§ 405(b)(1) and 405(d) [29 U.S.C. §§ 1105(b)(1), (d)], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or

liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

* * *

ERISA TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B—REGULATORY PROVISIONS
PART 5—ADMINISTRATION AND ENFORCEMENT

8. ERISA § 502, 29 U.S.C. § 1132, provides in part as follows:

§ 502. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C. § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 U.S.C. § 1169(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1), (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 U.S.C. § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 [26 U.S.C. §§ 401(a), 403(a), or 405(a)] (or

with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 U.S.C. §§ 105 *et seq.*, §§ 1081 *et seq.*] (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 U.S.C. § 1145].

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 [29 U.S.C. §§ 701 *et seq.*] against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 733(a)(1)) [29 U.S.C. § 1191b]. Nothing in this paragraph shall affect the authority of the

Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.

(1) Administrator's refusal to supply requested information. Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 [29 U.S.C. § 1166(a)(1), (4)] or section 101(e)(1) [29 U.S.C. § 1021(e)(1)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of

up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [sic (b)(1)] [29 U.S.C. § 1021(b)(4) [sic (b)(1)]]. For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) [29 U.S.C. § 1024(a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 U.S.C. § 1021(d)] with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 101(f)(1) [29 U.S.C. § 1021(f)(1)].

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 101(g) [29 U.S.C. § 1021(g)].

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 104(a)(6) [29 U.S.C. § 1024(a)(6)], the plan administrator fails to

furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act.

* * *

(h) Service Upon Secretary of Labor and Secretary of the Treasury.

A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 U.S.C. §§ 1101 *et. seq.*]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty.

In the case of a transaction prohibited by section 406 [29 U.S.C. § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 U.S.C. § 4975(f)(4)] for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 U.S.C. § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 U.S.C. § 4975(e)(1)].

* * *

(l) Civil penalties on violations by fiduciaries.

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 U.S.C. §§ 1101 *et seq.*] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) --

(A) pursuant to any settlement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that --

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [26 U.S.C. § 4975].

(m) In the case of a distribution to a pension plan participant or beneficiary in violation of section 206(e) [29 U.S.C. § 1056(e)] by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each distribution.

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE D—MISCELLANEOUS EXCISE TAXES
CHAPTER 43—QUALIFIED PENSION, ETC., PLANS

9. Section 4975 of Title 26, United States Code, provides in part as follows:

§ 4975. Tax on prohibited transactions

(a) Initial taxes on disqualified person

There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) Additional taxes on disqualified person

In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) Prohibited transaction

(1) General rule

For purposes of this section, the term "prohibited transaction" means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) Special exemption. – The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is --

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption

and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1108(a)].

* * *

(e) Definitions.–

(1) Plan–For purposes of this section, the term "plan" means--

(A) a trust described in section 401(a) [26 U.S.C. § 401(a)] which forms a part of a plan, or a plan described in section 403(a) [26 U.S.C. § 403(a)], which trust or plan is exempt from tax under section 501(a) [26 U.S.C. § 501(a)],

(B) an individual retirement account described in section 408(a) [26 U.S.C. § 408(a)],

(C) an individual retirement annuity described in section 408(b) [26 U.S.C. § 408(b)],

(D) a medical savings account described in section 220(d) [26 U.S.C. § 220(d)],

(E) an education individual retirement account described in section 530 [26 U.S.C. § 530], or

(F) a trust, plan, account, or annuity, which, at any time has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.

(2) — Disqualified person

For purposes of this section, the term "disqualified person" means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of

officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) Fiduciary.--For purposes of this section, the term "fiduciary" means any person who--

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary

responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1105(c)(1)(B)].

* * *

(f) Other definitions and special rules

For purposes of this section—

(1) Joint and several liability.– If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) Taxable period.– The term "taxable period" means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of--

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a), is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) Sale or exchange; encumbered property.– A transfer of real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

(4) Amount involved.– The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value--

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

(5) Correction.– The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position

not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

* * *

(h) Notification of Secretary of Labor. – Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

(i) Cross references.–

For provisions concerning coordination procedures between Secretary of Labor and Secretary of Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1203].

ERISA TITLE III—JURISDICTION, ADMINISTRATION, ENFORCEMENT; JOINT PENSION TASK FORCE, ETC.
SUBTITLE A—JURISDICTION, ADMINISTRATION, AND ENFORCEMENT

10. ERISA § 3003, 29 U.S.C. § 1203, provides as follows:

§ 3003. Procedures in connection with prohibited transactions

(a) Notification to Secretary of Labor; opportunity to comment on imposition of tax under Code Sec. 4975; waiver; requests for investigations.

Unless the Secretary of the Treasury finds that the collection of a tax is in jeopardy, in carrying out the provisions of section 4975 of the Internal Revenue Code of 1986 [26 U.S.C. § 4975] (relating to tax on prohibited transactions) the Secretary of the Treasury shall, in accordance with the provisions of subsection (h) of such section, notify the Secretary of Labor before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b) of such section, and, in accordance with the provisions of subsection (h) of such section, afford the Secretary an opportunity to comment on the imposition of the tax in any case. The Secretary of the Treasury shall have authority to waive the imposition of the tax imposed under section 4975(b) [26 U.S.C. § 4975(b)] in appropriate cases. Upon receiving a written request from the Secretary of Labor or from the Pension Benefit Guaranty Corporation, the Secretary of the Treasury shall cause an investigation to be carried out with respect to whether the tax imposed by section 4975 of such Code [26 U.S.C. § 4975] should be applied to any person referred to in the request.

(b) Consultation.

The Secretary of the Treasury and the Secretary of Labor shall consult with each other from time to time with respect to the provisions of section 4975 of the Internal Revenue Code of 1986 [26 U.S.C. § 4975] (relating to tax on prohibited transactions) and with respect to the provisions of title I of this Act relating to prohibited transactions and exemptions therefrom in order to coordinate the rules applicable under such standards.

(c) Transmission of Information to Secretary of the Treasury.

Whenever the Secretary of Labor obtains information indicating that a party-in-interest or disqualified person is violating section 406 of this Act [29 U.S.C. § 1106], he shall transmit such information to the Secretary of the Treasury.

LEGISLATIVE HISTORY

1. S. 1179, 93d Cong., 1st Sess. § 501(c)(3), (d)(17) (1973) [Not Enacted]

Reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 1, at 780, 945, 949, 950, 955-56 (1976)

TITLE V – FIDUCIARY STANDARDS

Part A – FIDUCIARY STANDARDS FOR PLAN OFFICERS AND EMPLOYEES

SEC. 501 QUALIFICATIONS AND RESPONSIBILITIES OF INDIVIDUALS

* * *

(c) FIDUCIARY RESPONSIBILITIES.—With respect to any fund established under an employee benefit plan to which this section applies, any person serving as a fiduciary—

* * *

(3) shall not participate in any transaction which is or would be a prohibited transaction under section 4973 of the Internal Revenue Code of 1954 if such section applied to the fund.

(d) CIVIL ACTIONS.—

* * *

(17) Any party in interest who participates in a transaction described in subsection (c)(3) knowingly, or with reason to know that the transaction was a transaction to which that

subsection applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction. For purposes of this paragraph, the term "party in interest" means a person described in section 4973(e)(1) of the Internal Revenue Code of 1954.

2. H.R. 2, 93d Cong., 2d Sess. §§ 511 (adding § 15(i)), 693 (as passed by the Senate on Mar. 4, 1974) [Not Enacted]

Reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3599, 3772, 3780, 3816-17 (1976)

FIDUCIARY STANDARDS

SEC. 15.

* * *

(i) Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

* * *

SEC. 693. ACTIONS TO REDRESS OR RESTRAIN VIOLATIONS OF FIDUCIARY DUTY.

Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any

responsibility, obligation, or duty of a fiduciary, including but not limited to, the removal of a fiduciary who has failed to carry out his duties and the removal of any person who is serving in violation of the requirements of section 15(h) of the Welfare and Pension Plans Disclosure Act or against any person who has transferred or received any of the assets of a plan or fund in violation of the fiduciary requirements of the Welfare and Pension Plans Disclosure Act or in violation of the document or documents governing the establishment or operation of the fund, may be brought by any participant or beneficiary of any employee benefit plan or fund subject to the Welfare and Pension Plans Disclosure Act in any court of competent jurisdiction, State or Federal, or the United States District Court for the District of Columbia, without respect to the amount in controversy and without regard to the citizenship of the parties. Where such action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found. Such actions may also be brought by a participant or beneficiary as a representative party on behalf of all participants or beneficiaries similarly situated. In all civil actions authorized by this Act or the Welfare and Pension Plans Disclosure Act, attorneys appointed by the Secretary shall represent the Secretary except as provided in section 518(a) of title 28, United States Code (relating to litigation before the Supreme Court of the United States).

3. H.R. 2, 93d Cong., 2d Sess. §§ 111(b), (d), (e), 503(e) (as passed by the House on Feb. 28, 1974) [Not Enacted]

Reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3897, 3947, 3950-51, 3953-55, 4044, 4047 (1976).*

FIDUCIARY RESPONSIBILITY

SEC. 111.

* * *

(b)(1) A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) For the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the

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*[Note: On March 6, 1994, the Senate ordered that there be printed additional copies of H.R. 2 as it passed the House of Representatives on February 28, 1974. It is this version of H.R. 2 that was reprinted in the *Legislative History of the Employee Retirement Income Security Act of 1974*. *See id.* at 3898. Thus, the printed version of H.R. 2 as passed by the House bears the caption: "IN THE SENATE OF THE UNITED STATES, March 6, 1974, ordered printed as passed by the House, by unanimous consent." *Id.* For a summary of the sequence in which these bills were introduced and/or considered, see 120 Cong. Rec. 8851 (1974).]

conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments so as to minimize the risk of large losses unless under the circumstances it is prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as is consistent with this title.

(2) Except as permitted under subsection (a)(2) of this section, a fiduciary with respect to a plan shall not—

(A) deal with the assets of the plan for his own account,

(B) in his individual or any other capacity act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries,

(C) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan,

(D) permit the transfer of any property of the plan to or its use by any person known to be a party in interest, except in return for no less than adequate consideration, or

(E) permit the acquisition of any property or services from any person known to be a party in interest, except in exchange for no more than adequate consideration.

* * *

(d) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the fund resulting from each breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the fund by the fiduciary and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 113 of this Act.

(e) All assets of any employee benefit plan (other than any contract for the payment of annuities which is guaranteed by an insurance company and not issued to a trustee of the plan) shall be held in trust by one or more trustees. Such trustee or trustees shall either be named in the trust instrument or appointed by the administrator or administrators, and, upon acceptance of their appointment, shall have exclusive authority and discretion to manage, and exclusive control of, the assets of the plan (subject to proper directions of the administrator which are made under the terms of the plan and which are not contrary to this title and except to the extent that authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers). If the assets of a plan are held by two or more trustees—

(1) each shall use reasonable care to prevent a co-trustee from committing a breach, notwithstanding language to the contrary in the trust agreement; and

(2) they shall jointly manage and control the assets of the trust, except that nothing in this paragraph (2) shall preclude any agreement authorized by the trust instrument allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this paragraph (2) either individually or as a trustee for any loss resulting to the fund arising from the acts or omissions to act on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated, unless the trustee to whom the responsibilities, obligations, or duties were not allocated participated knowingly in the activities constituting a breach of the specific responsibilities, obligations, or duties allocated to any other trustee.

* * *

ENFORCEMENT

SEC. 503.

* * *

(e) Civil actions under this title may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (b) of this section, or

(B) to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 111(d); or

(3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this title.

4. Summary of Differences Between the Senate Version and the House Version of H.R. 2-To Provide for Pension Reform, committee prints prepared for the use of the Senate and House conferees on H.R. 2, Committee Print No. 1, Pt. 3, p. 9, 93d Cong., 2d Sess. (1974)

Reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 5249, 5259 (1976)

9. Civil Liability

House bill.—

(1) Fiduciaries who breach any of their obligations under the bill are to be personally liable to the plan for losses resulting from the breach and for profits made through the use of plan assets, and are to be subject to other appropriate equitable relief, including removal.

(2) Fiduciaries are not to be liable for any breach committed before they became fiduciaries or after they cease to be fiduciaries.

Senate amendment.—This provision is included only in the Labor Act amendment.

(1), (2) Substantially the same as the House bill.

(3) Additionally, parties-in-interest who knowingly participate in a prohibited transaction, or had reason to know it was a prohibited transaction, are to be personally liable for losses sustained by the plan or for profits they realized from the transaction.

Staff comment.—

(1), (2) Substantially the same in both bills.

(3) The conferees may wish to adopt the approach of the House bill and not provide civil liability for parties-in-interest.[1]

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[1] Not all the staff agree with this suggestion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION and JOHN A. EDWARDSON, Plaintiffs,	)	
vs.	)	No. 92 C 5883
SALOMON BROTHERS, INC. and SALOMON BROTHERS REALTY CORP., Defendants.	)	

MEMORANDUM DECISION

Joan H. Lefkow, Magistrate Judge:

Plaintiffs, Harris Trust and Savings Bank, as Trustee for Ameritech Pension Trust ("APT"), Ameritech Corporation ("Ameritech") and John A. Edwardson, seek recovery from Salomon Brothers, Inc. and Salomon Brothers Realty Corporation (collectively "Salomon") for alleged violations of various provisions of the Employee Retirement Income Security Act ("ERISA") and several state laws. Salomon has filed two counterclaims seeking contribution from Ameritech. Both sides have filed motions for summary judgment with respect to portions of the Second Amended Complaint ("complaint"): cross motions are pending with respect to count II which alleges liability based on Salomon's participation in transactions that are prohibited under ERISA, and Salomon further seeks summary judgment with respect to counts I and III of the complaint which allege other ERISA

violations.[1] Plaintiffs in turn seek summary judgment on Salomon's counterclaims.

PROCEDURE ON SUMMARY JUDGMENT

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine issue of fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions and affidavits that are part of the record. Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, (1986). It may meet this burden without coming forward with affirmative evidence to negate the nonmovant's claim if it can show the absence of evidence that would support an essential element of the nonmoving party's case. *Id.*, 106 S. Ct. at 2552-53. In response, the non-moving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324, 106 S. Ct. at 2553. A material fact must be outcome determinative under

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[1] The court previously dismissed counts IV through VII, XI and XII of the complaint. *See Harris Trust and Savings Bank v. Salomon Brothers, Inc.*, 832 F. Supp. 1169 (N.D. Ill. 1993)(Aspen, J.). As a result, only counts I through III (the ERISA claims) and counts VIII through X (the state law claims) remain at issue. Although Salomon has separately moved for summary judgment with respect to the state law claims, the parties have agreed to defer briefing that motion until after this decision with respect to the federal claims. Also pending are Salomon's motions to strike certain evidentiary items that plaintiffs have offered in support of their motion regarding count II and in opposition to Salomon's motion on the federal claims.

the governing law. *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991).

Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983), the non-moving party's evidence is to be believed and all reasonable inferences from the facts must be viewed in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984). Because plaintiffs and defendants have filed cross motions with respect to count II, the court must rule on each party's motion individually, determining in each case whether judgment may be entered in accordance with the standard set forth in Rule 56. *Wausau Ins. Co. v. Valspar*, 594 F. Supp. 269, 270 (N.D. Ill. 1984).

FACTUAL BACKGROUND[2]

Ameritech sponsors and administers two pension plans, which qualify as employee pension benefit plans under ERISA. The plans are funded through APT, for which Harris is a directed trustee. Edwardson was a member of Ameritech's Asset Management Committee, the committee which Ameritech has authorized to act for the company in managing and administering APT. Each plaintiff is a fiduciary of APT within the meaning of ERISA.

During the relevant time period, Ameritech, through its Asset Management Committee, appointed National Invest-

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[2] Additional factual detail surrounding the transactions at issue can be found in Judge Aspen's two prior opinions in this matter. *See* 832 F. Supp. 1169 (N.D. Ill. 1993) and 813 F. Supp. 1340 (N.D. Ill. 1992). The court has assumed the reader's familiarity with those decisions. Moreover, because of the variety of legal issues involved, a significant number of facts are addressed as needed in the following sections.

ment Services of America, Inc. ("NISA") to serve as the investment manager for APT's dedicated bond fund ("DBF") and, as a result, delegated investment decisions concerning the assets within that portfolio to NISA.

Salomon Brothers, Inc. is a Delaware corporation engaged in the business of investment banking and underwriting securities. At the time at issue herein Salomon Brothers, Inc. had expertise and experience related to the hotel industry. Salomon Brothers Realty Corp. is a New York corporation which is affiliated with Salomon Brothers, Inc. Both corporations are owned by Salomon Brothers Holding Company, Inc. During the 1980's and thereafter, Salomon served as a broker-dealer on numerous debt and equity transactions for the plans whose assets APT holds.

On three separate occasions in 1987, 1988 and 1989, Motels of America, Inc. ("MOA") acquired various motel properties pursuant to financing set up by Salomon. Essentially, MOA issued mortgage notes secured by the motel properties and Salomon acting as principal, purchased all the notes for later resale to various institutional investors. At the closing of each of these transactions, MOA paid Salomon for its services. A portion of the fee was in cash and MOA also entered into a written fee agreement which gave Salomon certain rights to participate in the net cash flow, sale or refinancing proceeds, and property appreciation associated with the motel properties that MOA had acquired ("Fee Agreements I-III"). In October 1989, Best Inns, Inc. acquired nine hotel properties pursuant to a similar financing plan arranged by Salomon. At the closing of the transaction, Best Inns and Salomon also entered into a fee agreement ("Fee Agreement IV").

In 1987, Salomon offered to sell APT its interest in Fee Agreement I. Negotiations ensued in which Salomon provided a confidential offering memorandum and advocated the fee agreement as an appropriate and advantageous investment for APT. At some point, either Ameritech or NISA, acting in its capacity as investment manager, requested that Salomon retain a partial interest in the Fee Agreement. This request was made because NISA lacked the ability to evaluate MOA on a continuing basis and it wanted to take advantage of Salomon's claimed expertise in this area. In effect, there was a desire to keep Salomon's interests aligned with APT's to ensure that Salomon would continue to receive and evaluate information relating to the soundness of the Fee Agreement as an investment and to encourage Salomon to provide continuing advice regarding the investment to APT. Plaintiffs have submitted evidence that, as part of the transaction, Salomon in fact orally agreed to monitor MOA's and Best Inn's financial performance for APT/NISA and to provide information regarding that performance on an on-going basis.[3] On October 28, 1987, APT purchased 95% of Salomon's interest in Fee Agreement I. In 1988, after Salomon received Fee Agreement II, Salomon approached APT/NISA to purchase an interest in it. APT purchased 100% of Fee Agreement II.

In fall of 1989 Salomon again approached APT about purchasing an interest in Fee Agreement III. Salomon failed, however, to pass on certain adverse information concerning the performance of the underlying MOA properties, as well as adverse developments affecting the value of Fee Agreements I and II. On December 22, 1989, APT purchased 95% of Salomon's interest in Fee Agreement III and, on that same day, purchased 95% of Salomon's interest in Fee Agreement IV relating to the Best Inns properties.

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[3] The parties dispute the existence of any alleged oral agreement to monitor the Fee Agreements. Even if it did engage in monitoring activities, Salomon further disputes whether it was acting in its own interests or on behalf of APT.

The purchase of each participation interest in the Fee Agreement was effected pursuant to a written Assignment. Each Assignment sets forth the percentage interest to be assigned and the amount to be paid in consideration for the assignment and transfer of that interest. It also sets forth certain representations and warranties of the assignor and assignee. One of the APT's representations was that APT had "conducted an independent investigation of [MOA or Best Inns]" and that APT "has not relied upon any representation or warranty . . . by [Salomon] . . ., except as expressly set forth in Section 3 of this Assignment." The Assignment further contains an integration clause providing

> This assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

Plaintiffs further submit that during negotiations for and after the closing of the Fee Agreement transactions, Salomon made numerous falsely positive representations regarding MOA and Best Inns. Salomon also failed to disclose information regarding performance declines and other facts which would have alerted plaintiffs to the precarious condition of the investments. Thus, despite Salomon's representations to the contrary, the Fee Agreements were virtually worthless. Both MOA and Best Inns are bankrupt.

ANALYSIS

ERISA is a comprehensive statute designed to protect employee benefit plans. In furtherance of its goals, the statute

designates certain parties as plan fiduciaries, 29 U.S.C. § 1002(21), and imposes personal liability on them for any injury to the plan resulting from a breach of their fiduciary duties. 29 U.S.C. § 1109(a). ERISA also designates other persons as "parties in interest" and specifically prohibits plan fiduciaries from engaging in certain transactions with parties in interest. *Id.* § 1106. Section 1132 then sets forth a variety of enforcement provisions describing the circumstances under which the Secretary of Labor, as well as plan participants, beneficiaries and fiduciaries, may initiate civil actions to redress violations of the act.

Count I

In count I, plaintiffs allege that Salomon is a fiduciary of APT within the meaning of ERISA § 1002(21) and that Salomon's sale of the Fee Agreement participation interests to APT, as well as Salomon's failure to subsequently monitor the investment breached fiduciary duties that Salomon owed to APT. Salomon contends that plaintiffs have failed to offer any admissible evidence that Salomon was a fiduciary of APT and, further, that the undisputed evidence establishes that it was not such a fiduciary.

A person will be deemed to be a fiduciary with respect to an ERISA plan

> to the extent that (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . .

29 U.S.C. § 1002(21)(A). In keeping with ERISA's remedial goals, the courts liberally construe the word "fiduciary" to be more rather than less inclusive. Whether a person qualifies

as a fiduciary must be judged according to objective standards. *Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 291-92 (7th Cir. 1989). If the requirements of the statute and the regulations promulgated thereunder are met, it makes no difference whether the parties involved subjectively believe that a fiduciary relationship exists. *Id.* Although plaintiffs claim that Salomon qualifies as a fiduciary under both statutory definitions, evidence that Salomon fits within either definition is sufficient to prevent entry of summary judgment against plaintiffs. As a result, the court will separately consider the two standards.

a. Discretionary Authority or Control

Plaintiffs contend that summary judgment is inappropriate because there is a question of fact whether Salomon had discretionary authority or control respecting the management of a portion of APT's assets. In support of this contention, plaintiffs point to evidence that before NISA decided to invest APT's assets in the Fee Agreements, NISA sought and obtained Salomon's oral agreement to continually monitor the investments' performance on behalf of APT/NISA and NISA required Salomon to retain a 5% interest in three of the four Fee Agreements. Plaintiffs' evidence indicates that NISA insisted on these conditions to insure that Salomon's interest would be aligned with APT's interest and, therefore, "Salomon would provide NISA/APT with whatever information or decisions it needed." *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 14. In short, NISA believed it lacked the ability to evaluate the fee agreements on an ongoing basis and wanted to take advantage of Salomon's claimed expertise in the area. Salomon responds that any evidence relating to an alleged oral agreement to monitor is barred by the parol evidence rule, but even if such an agreement existed, it did not provide Salomon with the type of discretionary control over

APT's assets that creates a fiduciary relationship within the meaning of ERISA § 1002(21).

In *Farm King*, the Seventh Circuit pointed out that the cases finding a fiduciary relationship based on discretionary control over the management of an employee benefit plan or its assets had a common theme, namely, "the authority to exercise control unilaterally over a portion of a plan's assets, not merely to propose investments." *Farm King*, 884 F.2d at 292. There, the court concluded that a brokerage firm did not have the requisite discretion despite evidence that over the course of four years, the brokerage firm's representatives had had complete discretion in selecting and presenting securities to the plan, the firm had made recommendations regarding various investments and the plan's trustees had purchased securities almost exclusively from the brokerage firm. *Id.* The lesson of *Farm King* is that "discretionary control" requires something more than influential advice, it requires proof that an alleged fiduciary actually exercised some amount of decision-making power with respect to the plan's assets or had the authority to do so. *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir. 1991). While proof that the plan has specifically delegated decision-making authority to the alleged fiduciary is not required, there must, at a minimum, be some indication that the alleged fiduciary's influence has so transcended normal bounds that it effectively has caused the plan's trustees to abdicate their independent decision-making powers to the alleged fiduciary. *See e.g., Schloegel v. Boswell*, 994 F.2d 266, 271 (5th Cir. 1993); *Reich v. McManus*, 883 F. Supp. 1144, 1149 (N.D. Ill. 1995)(summary judgment inappropriate where plan trustees had stated that all investment decisions were based exclusively on broker's advice and broker had notified at least one trustee that the trustees had to follow his advice or find a new consultant). In other words, there must be evidence that the alleged fiduciary is effectively acting for the plan. *Associates*

in Adolescent Psychiatry v. Home Life Insurance Co., 941 F.2d 561, 570 (7th Cir. 1991).

Here, the evidence of Salomon's influence, taken in a light favorable to plaintiffs, fails to rise to the requisite level of control. Even assuming Salomon's alleged oral agreement to monitor the fee agreement is admissible,[4] nothing indicates that information from Salomon was or was intended to be the exclusive basis of NISA/APT's investment decisions. To the contrary, a review of plaintiff's evidence in this regard reveals that Salomon was to provide information not otherwise available to NISA but that NISA understood that there was a need for skepticism with respect to the information because as buyer and seller their interests were at odds. Indeed, those adverse interests are one of the reasons that NISA wanted Salomon to retain an equity interest in the investments — to increase the reliability of the information received by aligning Salomon's interests with that of APT. In a telling comment, Joseph Gorman, president of NISA, testified that "[i]n the last analysis, [NISA] had to independently assess whether [the Fee Agreements] ought to come into the portfolio. But in doing that we relied upon expertise that was other than our own; and that would be primarily Salomon, secondarily Ameritech." While it is clear that Salomon's advice was to be influential, it is also evident that neither APT or NISA had relinquished discretionary authority to Salomon.

Although, plaintiffs assert, Mr. Gorman also testified that Salomon was to "bring [NISA] whatever information or *decisions* we needed" (emphasis added), a review of the actual testimony reveals that Salomon was to follow the investment and report to NISA as required, thereby providing NISA/APT with useful information and apprising NISA/APT

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[4] Whether evidence of the oral agreement is admissible is addressed in the next section.

of decisions that NISA/APT needed to make.[5] As an example of the way in which the parties were to operate, Mr. Gorman stated, "if there was a choice to be made representing our part of the investment, that we be presented the choice and we would make the choice." Gorman Dep. at 350.

Despite plaintiffs' contention that Salomon's claimed expertise in the area of these real estate investments made Salomon's advice especially influential, influence over the trustees' investment decisions does not amount to effective control over plan assets. While persons who render advice to a plan may play influential roles by virtue of the expertise they possess or the capacities in which they act, to be a fiduciary such persons must exercise what amounts to actual decision-making power. *Reich v. Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995); *Schloegel*, 994 F.2d at 271. Based on this record, it appears that Salomon's relationship to APT was more akin to the relationship at issue in *Farm King*,

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[5] More fully, Mr. Gorman stated,

> When we were clarifying roles and understandings about who would do what with respect to the MOA investment, [NISA] relied upon the fact that Salomon was [MOA's] investment banker, that [Salomon] had access to information that otherwise would not be available to us. And that as partners in the ownership of [the fee agreements], [Salomon] would follow it closely, appraise us of those things that affected our interest and bring to us whatever either information or decisions we needed to — most especially having to do with the closing, with the appraisal at the end where we would — where Ameritech would get out of their investment.

Gorman Dep. at 606-07. Even construing this testimony in a light favorable to plaintiffs, it is unreasonable to infer that Salomon was to be the decisionmaker.

where the broker periodically made presentations regarding the performance of prior investments and recommended courses of action with respect to both prior and future investments; the actual investment decisions, however, were left to the trustees. There is no evidence that Salomon, assuming it agreed to monitor the investments, did more. NISA remained free to reject any advice or information received from Salomon and there is no evidence that it ever purposefully or effectively surrendered that freedom. On this record, then, Salomon does not qualify as a plan fiduciary within the meaning of § 1002(21)(A)(i).

b. Rendering Investment Advice

Plaintiffs alternatively argue that Salomon is a fiduciary within the meaning of § 1002(21) because it was paid to provide investment advice regarding APT's money or property. *See* 29 U.S.C. § 1002(21)(A)(ii). To assist in deciding whether a person qualifies as an investment advisor fiduciary, the Department of Labor ("DOL") has promulgated regulations explaining that a person shall only be deemed to be rendering "investment advice" to an employee benefit plan if

> (i) such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and
>
> (ii) such person either directly or indirectly . . .
>
> (A) has discretionary authority or control, whether pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or
>
> (B) renders any advice . . . on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between

> such person and the plan . . . that such services will serve as a primary basis for investment decisions . . . and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

29 C.F.R. § 2510.3-21(c)(1). The parties seem to agree that Salomon provided NISA/APT with information or recommendations that would satisfy subsection (i) of the DOL regulation. Their dispute centers on whether there is evidence satisfying the requirements of subsection (ii)(B).[6] Salomon contends that there is no admissible evidence of a mutual agreement or understanding that Salomon would provide advice that would serve as the primary basis for APT's investment decisions. Moreover, even if there was a mutual understanding, Salomon contends that it received no fee or compensation for any alleged investment advice. Plaintiffs, of course, disagree.

The starting point for the analysis is whether there is adequate evidence to establish the existence of a mutual understanding between Salomon and NISA/APT to the effect that Salomon's advice would serve as the primary basis for NISA/APT's investment decisions. *Farm King*, 884 F.2d at 293. Again, plaintiffs rely on testimony and other evidence

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[6] Plaintiffs also contend that Salomon qualifies as an investment advisor fiduciary under subsection (ii)(A), but as courts have recognized, subsection (ii)(A) of the DOL regulation is essentially an overlap of ERISA § 1002(21)(A)(i). *Olson v. E.F. Hutton & Co., Inc.*, 957 F.2d 622, 626 (8th Cir. 1992). As discussed above, there is no evidence that Salomon exercised discretionary control with respect APT's participation interests. Subsection (ii)(A) of the DOL regulations is not satisfied.

indicating that before the Assignments were executed, NISA sought and obtained Salomon's oral agreement to monitor the fee agreements and provide NISA/APT with the information necessary to make appropriate investment decisions. While insufficient to establish discretionary control over APT's assets, such pieces of evidence might raise a question of fact as to whether the requisite mutual understanding existed. Nevertheless, the court need not decide that issue because, as Salomon points out, the assignment of the participation interests was effected through an integrated written contract and, therefore, the parol evidence rule renders proof of the alleged oral agreement legally inadmissible.

Under New York law,[7] parol evidence is not admissible to vary or contradict the terms of a written agreement where the writing expresses the entire agreement of the parties, i.e., it is integrated. *Stroll v. Epstein*, 818 F. Supp. 640, 645 (S.D.N.Y. 1993). Here, each Assignment appears to be complete on its face and expressly provides that the written contract constitutes the entire agreement between the parties. *Id., citing, Happy Dack Trading Co., Ltd. v. Agro-Industries, Inc.*, 602 F. Supp. 986, 991 (S.D.N.Y. 1984) (a contract is integrated as a matter of law if it appears complete on its face). The Assignments are otherwise unambiguous and make no reference to a separate agreement to monitor. While

[7] Each Assignment transferring a percentage of Salomon's interests in the Fee Agreements provides that the Assignment will be governed by New York law. Because the parol evidence rule is substantive, not procedural, this court must look to the appropriate state law for guidance. As a federal court sitting in diversity, the court must apply the choice of law rules of the state in which it sits. Because Illinois will honor a contractual choice of law provision absent certain conditions not present here, the court must apply New York law in interpreting the Assignments. *Janice Doty Unlimited, Inc. v. Stoecker*, 697 F. Supp. 1016, 1019 (N.D. Ill. 1988).

acknowledging the general contours of the parol evidence rule, plaintiffs argue that ERISA § 1110(a)[8] overrides the rule or preempts its application under circumstances like those presented here. They reason that relying on the Assignments' integration clause to preclude evidence of Salomon's fiduciary status is tantamount to using that provision to relieve Salomon of its fiduciary responsibilities. This argument is not persuasive. Assuming admissible evidence established that Salomon was an ERISA fiduciary, the integration clause would not relieve Salomon of any responsibility or liability attendant with that status. The parties merely agreed to limit their respective roles to that which is set forth in the Assignments. Whatever liability or responsibility follows from those roles remains unlimited. The Seventh Circuit has recognized the importance of this distinction. In a case where a contract vested one party with sufficient discretionary authority to be deemed an ERISA fiduciary, the court stated that despite ERISA § 1110(a) parties may contractually decide how much authority to vest in a person (potentially precluding a finding of fiduciary status), but they may not decide how much liability attaches to the exercise of that authority if the authority so bestowed makes that person a fiduciary. *Chicago Bd. of Options Exchange, Inc. v. Connecticut General Life Ins. Co.*, 713 F.2d 254, 259 (7th Cir. 1983). In short, § 1110(a) is inapplicable.

Plaintiffs also argue that proof of the monitoring agreement is admissible because it was a condition precedent to the assignment of Salomon's interests in the Fee Agreements. New York law does permit the use of parol evidence to es-

[8] This section provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a).

tablish a condition precedent that precludes the legal effectiveness of the contract absent the occurrence of the condition, but only if the condition does not contradict the terms of the writing. *Hicks v. Bush*, 10 N.Y.2d 488, 180 N.E.2d 425, 427 (N.Y. 1962). Thus, despite plaintiffs' evidence that NISA would not have proceeded with the transaction absent the monitoring agreement, evidence of the alleged oral agreement is barred. It directly contradicts the terms of the Assignments which state that there are no other agreements between the parties other than those set forth therein. In other words, the language of the Assignment indicates that, unless otherwise set forth therein, the purchase and sale was unconditional. In a similar situation, an alleged oral condition to the effectiveness of a guaranty was found to be not proveable as a matter of law. *See Bank Leumi Trust Co. of New York v. Wulkan*, 735 F. Supp. 72, 77-78 (S.D.N.Y. 1990)(alleged oral agreement that effectiveness of guaranty was conditioned upon guarantor obtaining permission from proper governmental authorities). Plaintiffs' position may be better characterized as an intent to purchase Salomon's alleged agreement to monitor in addition to the participation interests. While NISA may not have intended to proceed with the transaction without this additional consideration, the alleged oral agreement is not a condition precedent in the sense that nonoccurrence of the condition precludes enforcement of the contract. The purchase and sale of the participation interests took place in accordance with the written Assignments; parol evidence cannot now be permitted to vary the terms of the sale.

Plaintiffs next argue that proof of Salomon's representations that it would monitor the fee agreement investments is admissible because a general merger clause is ineffective to exclude parol evidence to show fraud in the inducement of a contract. Although plaintiffs are correct that New York law does permit the introduction of parol evidence to prove allegations of fraud, the introduction of the alleged agreement to

monitor for this purpose would not materially advance plaintiffs' claim that Salomon is an investment advisor fiduciary. Proof that Salomon induced NISA to invest in worthless instruments by making fraudulent promises to monitor does not establish the mutual agreement that is essential to proving Salomon's status as an investment advisor fiduciary. To the contrary, it would suggest that there was no mutual agreement. While such evidence would be relevant to a claim that Solomon committed fraud, it is insufficient to establish the requisite contractual meeting of the minds. Plaintiffs have failed to offer admissible evidence of a mutual understanding between NISA and Salomon that Salomon would regularly provide investment advice which would serve as the primary basis of NISA/APT's investment decisions. In light of this conclusion, it is not necessary to consider whether Salomon received a fee or other compensation for any alleged investment advice.

In sum, plaintiffs have not offered sufficient evidence to create a genuine issue as to whether Salomon qualifies as an ERISA fiduciary. Salomon is entitled to summary judgment with respect to Count I of the Second Amended Complaint.

Count II

In this count, plaintiffs contend that regardless of whether Salomon qualifies as a fiduciary, they are entitled to restitution from Salomon because Salomon is a "party in interest" within the meaning of ERISA and, as a result, ERISA § 1106(a)[9] prohibits Salomon's participation in the Fee

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[9] The pertinent portions of § 1106(a) provide that

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(...continued)

Agreement transactions. 29 U.S.C. §§ 1106(a)(1)(A) and (D). They seek recovery pursuant to ERISA § 1132(a)(3).[10] Salomon responds that the court should enter summary judgment in its favor, not plaintiffs, because ERISA does not authorize any private cause of action against nonfiduciaries, even parties in interest who have engaged in § 1106(a) prohibited transactions. Assuming, for purposes of argument, that statutory authority exists, Salomon further contends that Seventh Circuit precedent precludes all private avenues of recovery against nonfiduciaries for participation in prohibited transactions. Salomon finally asserts that plaintiffs have failed to satisfy their evidentiary burden with respect to essential elements of their claim.

a. Availability of a Private Remedy

Determining whether count II alleges a valid cause of action centers on two closely related but distinct issues:

> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> * * *
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1)(A) & (D).

[10] This section provides that fiduciaries of a plan, like plaintiffs, may bring suit

> (A) to enjoin any act or practice which violates any provision of this subchapter [relating to the protection of employee benefit rights] or the terms of the plan, or
>
> (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3)(A) & (B).

whether it is a violation of ERISA for a nonfiduciary party in interest to engage in a § 1106(a) prohibited transaction and, if yes, whether ERISA affirmatively authorizes plaintiffs to bring suit to redress such a violation. Although the line between these issues is sometimes obscure, separate treatment provides a more reasoned understanding of ERISA's language and legislative history, as well as the relevant case law.

Turning to the first issue, Salomon relies on *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063 (1993), to assert that § 1106(a) does not explicitly impose any duty on *nonfiduciary* parties in interest to avoid participation in the indicated "prohibited" transactions, and, therefore, it has committed no wrong that is remediable under ERISA. In *Mertens*, the Supreme Court considered whether ERISA authorizes a cause of action against a nonfiduciary for knowing participation in the breach of another's fiduciary duties. The Court recognized that § 1132(a)(3), the same enforcement provision that is at issue here, does not authorize suit to obtain equitable relief "at large" but only for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. *Id.* at 253, 113 S. Ct. at 2067. Because no ERISA provision explicitly requires nonfiduciaries to avoid participation in an ERISA fiduciary's breach of its duties, the Court made clear its view, although in dicta, that such participation cannot be said to violate ERISA and, therefore § 1132(a)(3) would not authorize suit.[11] *Id.* Salomon would have the court apply identical rea-

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[11] The Court's discussion of this issue is dicta because the parties in *Mertens* assumed that the defendant's conduct violated ERISA. Therefore, the arguments before the Court and the Court's holding were limited to what forms of relief are available under § 1132(a)(3). *Mertens*, 508 U.S. at 254-55, 113 S. Ct. at 2067. Nevertheless, the Seventh Circuit has found the *Mertens* dicta to be controlling within this circuit. *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994)("the Supreme Court has made

(...continued)

soning to find that Salomon had no duty to avoid participation in the Fee Agreements. The Court in *Mertens*, however, specifically contrasted the absence of any provision giving rise to a nonfiduciary's duty to avoid "knowing participation," with other provisions which, it recognized, can be read to impose an obligation on nonfiduciary parties in interest to avoid participation in § 1106(a) transactions. *Mertens*, 508 U.S. at 254 & n.4, 113 S. Ct. at 2067 & n.4 ("ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries . . . ." "For example, a 'party in interest' . . . may not offer his services or engage in certain other transactions with the plan, § 1106(a), for more than reasonable compensation, § 1108(b)(2)."). Salomon's attempt to counteract the importance of the Supreme Court's distinction between the lack of duty in the case before it and the presence of a duty regarding § 1106(a) is without force. Indeed, Salomon seems to accept *Mertens*' belief that § 1106(a) can be read as imposing obligations on nonfiduciary parties in interest, but argues that the existence of a duty is not enough to authorize a civil action against it. *See e.g.*, Salomon's Memorandum Addressing Cases Supplementally submitted by Plaintiffs on the Parties' Cross Motions for Summary Judgment at 6. This argument is more applicable to the second half of the analysis and will be discussed below. Further, several appellate courts have acknowledged the significance of this distinction and have concluded that parties in interest are obligated to avoid the transactions prohibited in § 1106(a). *See e.g., Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994).

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clear its view that Congress's omission to impose on nonfiduciaries a duty not to participate knowingly in an ERISA fiduciary's breach of fiduciary obligations was not inadvertent").

In addition to the Supreme Court's acknowledgment, ERISA's legislative history reflects a congressional intent to obligate nonfiduciary parties in interest to abstain from participation in § 1106(a) transactions. A Joint Explanatory Statement of the Committee of Conference ("Conference Report"), reveals that, "[t]he conference substitute[12] prohibits plan fiduciaries *and parties in interest* from engaging in a number of specific transactions." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in*, 1974 U.S.C.C.A.N. 4639, 5087 (emphasis added). The Conference Report further indicates that "blind" purchases or sales, *e.g.*, where neither party knows the identity of the other, will not ordinarily be prohibited transactions, because "there is no reason to impose a sanction on a fiduciary (*or party-in-interest*) merely because, by chance, the other party turns out to be a party-in-interest (or plan)." *Id.* (emphasis added). Thus, the legislative history recognizes, at least implicitly, that both parties may be subject to sanctions when the parties in a prohibited transaction are known to each other. Contrary to Salomon's contention, then, the legislative history reveals that Congress perceived certain transactions between a plan and a party in interest as problematic, and in enacting § 1106(a) it intended to impose a duty on both parties in interest and fiduciaries to avoid such transactions. *Accord, Comm'r. of Internal Revenue v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160, 113 S. Ct. 2006, 2012 (1993)("Congress' goal [in § 1106(a)] was to bar

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[12] In enacting ERISA, the House of Representatives proposed a bill which the Senate rejected. The Senate then proposed its own legislation in the form of amendments to the House bill. Because of significant differences between the House and Senate proposals, the bills were sent to a committee of conference which agreed to a "conference substitute." The conference substitute was approved by both houses and enacted into law.

categorically a transaction that was likely to injure the pension plan.").[13]

Nevertheless, Salomon argues, the Seventh Circuit's adoption of the *Mertens* dicta in *Continental Casualty* is controlling within this circuit. In *Continental Casualty*, the Seventh Circuit determined that it was bound to follow *Mertens*' view that ERISA failed to impose any duty on nonfiduciaries to avoid knowing participation in an ERISA fiduciary's breach of its duties. 33 F.3d at 757. Although the Seventh Circuit found that dicta to be sufficiently weighty to control the outcome of the very issue that the dicta addressed, it did so only with some degree of discomfort. *Id.* at 757 (indicating that the Supreme Court's discussion was based on "a strict constructionist's approach that we might not embrace as an original matter"). In light of this obvious unease, it is not at all clear that the Seventh Circuit would find a similar lack of duty under the circumstances of this case, especially where *Mertens* itself, subsequent appellate court cases and ERISA's legislative history all indicate that different treatment is appropriate. Parties in interest, even if not fiduciaries of a plan, have a duty under § 1106(a) to avoid the transactions identified therein.

The question then becomes whether ERISA authorizes a private cause of action to recover against nonfiduciary parties in interest who violate § 1106(a). Salomon contends that ERISA not only fails to expressly create a private right of action but that the legislative history demonstrates that Congress rejected any such right. In contrast, the circuit courts that have addressed the issue have uniformly found

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[13] Indeed, if there were no duty to avoid such transactions, one might wonder whether there is any basis for imposing administrative penalties against parties in interest, a remedy which Salomon concedes is authorized. *See* 29 U.S.C. § 1132(i).

that ERISA's civil enforcement provision, 29 U.S.C. § 1132, provides the requisite authority. *See e.g., Stangl*, 73 F.3d at 1032; *Landwehr*, 72 F.3d at 734; *Compton*, 57 F.3d at 285-87; *Rowe*, 20 F.3d at 31. Despite factual differences between those cases and this one, their reasoning is persuasive.

The language of § 1132(a)(3) is plainly broad enough to constitute the needed "affirmative authorization." Under its terms, plaintiffs are entitled to bring an equitable action to redress any violation of ERISA or to enforce the terms of the statute. Because a party in interest's participation in a § 1106(a) prohibited transaction violates the statute, plaintiffs' suit can be said to be intended to redress the alleged violation and to enforce ERISA's ban on those transactions. That § 1132(a)(3) does not identify specific categories of potential defendants makes it clear that it was intended to authorize suit against any entity that violates ERISA. Thus, whether Salomon is a proper defendant does not turn on whether it is a fiduciary or nonfiduciary but on whether it violated ERISA, that is to say, whether it is in fact a party in interest who engaged in a prohibited transaction.

This conclusion is in accord with *Mertens* where the Court made clear its belief that § 1132(a)(5)[14] did not authorize suit because the nonfiduciary defendant had not violated ERISA, not because the section failed to expressly authorize suits against nonfiduciaries. Moreover, the Court strongly suggested that private suits could be used as an avenue of recovery against nonfiduciary parties in interest who engage in

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[14] Although the Court in *Mertens* was directly confronted with an action by the Secretary of Labor pursuant to § 1132(a)(5) (authorizing the Secretary of Labor to file suit on the same basis that a plan fiduciary, beneficiary or participant file suit under § 1132(a)(3)), the Court stated that the language of § 1132(a)(3) should be deemed to have the same meaning as § 1132(a)(5). *Mertens*, 508 U.S. at 260, 113 S. Ct. at 2070.

prohibited transactions. It stated, "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [§ 1106], and pay related civil penalties [under § 1132(i)] . . . ." Salomon counters that the Court must have been referring to the administrative "correction" of a prohibited transaction.[15] *See* 29 U.S.C. § 1132(i). Such an assumption, however, makes little sense in light of the mandatory nature of the Court's language. Although § 1132(i) authorizes the Secretary of Labor to levy a greater penalty against a party in interest if a prohibited transaction is not corrected, nothing in that section says that a party in interest must correct the transaction. Thus, despite the threat of a fine up to 100% of the amount at issue, a party in interest is nonetheless free to keep any ill-gotten plan assets.[16] The more reasonable interpretation of *Mertens* is that the Court

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[15] Section 1132(i) provides that

> In the case of a transaction prohibited by section 1106 . . . by a party in interest . . ., the Secretary [of Labor] may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved . . .; except that if the transaction is not corrected . . . such penalty may be in an amount not more than 100 percent of the amount involved.

29 U.S.C. § 1132(i). "Correction" is accomplished by undoing the prohibited transaction to the extent possible. *See* 29 C.F.R. § 2560.502i-1(c), *incorporating*, 26 C.F.R. § 53.4941(e)-1(c)(1).

[16] Under some circumstances, refusal to correct a prohibited transaction may be the more attractive option. Even where a party in interest corrects the transaction, the Secretary of Labor may still impose a civil penalty of up to 5% of the amount at issue. 29 U.S.C. § 1132(i).

was referring to an ability to use civil actions under § 1132(a) to force a party in interest to disgorge.[17]

Salomon insists, however, that Congress's specific imposition of administrative penalties and excise taxes on parties in interest is proof that all other remedies should be excluded. This argument is at odds with both the language of § 1132(a)(3) and ERISA's statutory purposes. ERISA is intended to provide protection for the interests of participants in employee benefit plans. 29 U.S.C. § 1001. Moreover, the Supreme Court has recently recognized that § 1132(a)(3) is a catch-all provision that operates as a safety net when the specific remedies set forth under ERISA are inadequate. *Varity Corp. v. Howe*, __ U.S. __, 116 S. Ct. 1065, 1077-78 (1996). To find that administrative penalties and excise taxes are the exclusive remedies against parties in interest who have engaged in prohibited transactions would provide little, if any, protection for the interests of the plan participants. For example, where the fiduciary who caused the plan to enter the transaction is judgment proof, there might be no means to recover the plan's lost assets. As the Ninth Circuit recognized in Landwehr, limiting the potential defendants to only one of two parties to the transaction, far from providing the full range of remedies available, would render the available

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[17] The Court's subsequent statement indicating that service providers "(assuming nonfiduciaries can be sued under [§ 1132](a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees," is best understood as specifically referring to suits against nonfiduciary service providers for knowing participation in an ERISA fiduciary's breach of its fiduciary duties. *See Mertens*, 508 U.S. at 262, 113 S. Ct. at 2072. As already discussed, the Court believed that such participation was not an ERISA violation, but assuming it was, it makes clear that § 1132(a)(3) would authorize an action for injunctive relief, restitution or other equitable remedies.

relief wholly inadequate. *Landwehr*, 72 F.3d at 734, *citing, Nieto v. Ecker*, 845 F.2d 868, 874 (9th Cir. 1988).

Salomon argues, however, that ERISA's legislative history undeniably shows that Congress expressly rejected any private cause of action against nonfiduciary parties in interest, and therefore the general language of § 1132(a)(3) should not be used to bring in such an action "through the back door." The court does not agree. Each of the rejected provisions would have imposed personal liability on parties in interest, subjecting them to claims for legal relief, *e.g.*, damages. The rejection of those provisions, however, does not necessarily rule out the potential for a compromise somewhere between no civil liability and personal liability for all losses, *e.g.*, the availability of a suit limited to equitable relief. Indeed, the final language of § 1132(a), with its inclusion of catch-all provisions for equitable relief, appears to be just such a negotiated compromise.[18]

But, Salomon argues, the Conference Report also states that ERISA's "labor provisions," of which § 1132 is a part, apply rules and remedies similar to trust law governing the conduct of *fiduciaries*, while the "tax provisions" (§§ 1201 *et seq.*) apply to "disqualified persons," i.e., parties in interest, who violate the new prohibited transaction rules. *See* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted*

[18] The original House bill would have made only fiduciaries personally liable for losses resulting from a violation of the prohibited transaction rules but even then only if there was no adequate consideration for the transaction. The Senate version, by contrast, would have extended legal relief to both fiduciaries and parties in interest, even if there was adequate consideration. The conference substitute appears to reach a compromise between these extremes in a number of ways, including the inclusion of § 1132(a)(3) and (5) which, while otherwise limiting the availability of legal relief to defendant fiduciaries, permit recovery of only equitable relief from nonfiduciaries who violate the Act.

in, 1974 U.S.C.C.A.N. at 5076. The intent that Salomon attributes to this statement (that the remedies provided in § 1132(a) should be limited to fiduciaries, while the tax provisions apply to parties in interest) is based on an overly narrow reading of the statute and the legislative history. Although Congress incorporated principles of traditional trust law into the labor provisions, it does not mean that Congress did not intend to extend the use of those principles beyond parties who would have constituted fiduciaries at common law. To the contrary, the Conference Report specifically states that the labor provisions affect "parties-in-interest," distinguishing this broader range of people from the "disqualified persons" affected by the tax provisions. *Id.* at 5087. Moreover, ERISA, in part, is a direct reflection of Congress' determination that trust law does not offer adequate protection to employee benefit plans. *See Varity Corp.*, __ U.S. __, 116 S. Ct. at 1070.

Salomon finally argues that regardless of the statutory analysis, the Seventh Circuit has unquestioningly foreclosed private claims against a nonfiduciary for ERISA violations, including participation in § 1106(a) prohibited transactions. This conclusion is built on a multi-tiered argument. First, Salomon correctly points out that any relief sought under § 1132(a)(3) must be equitable in nature. Second, Salomon contends, the Seventh Circuit, in *Continental Casualty*, held that restitution sought from a nonfiduciary is only equitable when the claim for recovery is based on a theory of aiding and abetting, i.e., knowing participation in, a breach of fiduciary duties. But, *Continental Casualty*, embracing *Mertens*' dicta, has held that a nonfiduciary cannot be held liable under § 1132(a)(3) for knowing participation in an ERISA fiduciary's breach of its fiduciary duties. Thus, Salomon concludes, a claim for restitution against a nonfiduciary necessarily falls into one of two categories: either it constitutes a claim for legal relief and is barred by *Mertens*, or it is based on an aiding and abetting/knowing participation theory and is

barred by *Continental Casualty's* adoption of the *Mertens* dicta.

The court is not persuaded by this argument. In *Continental Casualty*, the Seventh Circuit merely expressed a belief, though ultimately unnecessary to its decision, that restitution is not an exclusively equitable remedy. *Continental Casualty*, 33 F.3d at 756. It explained that whether restitution is an equitable remedy turns on whether the duty giving rise to the claim is founded on legal or equitable principles. The court concluded that the claim before it (nonfiduciary's knowing participation in a breach of fiduciary duty) was founded on equitable principles. Contrary to Salomon's contention, however, it did not hold, or even suggest, that such a claim was the only one where a request for restitution from a nonfiduciary could be based on equitable precepts. Indeed, such a limitation would be inappropriate in light of traditional trust law which provides rules permitting equitable actions to regain improperly transferred trust property for reasons other than the recipient's knowing participation in the trustee's breach of its fiduciary duties. *See e.g.*, 4 A. Scott & W. Fratcher, *The Law of Trusts*, §§ 288-94 (4th ed. 1989); Restatement (Second) of Trusts, §§ 280-295 (1959)(both discussing recovery from gratuitous donees and from recipients of trust property via illegal transactions). Salomon is not entitled to summary judgment on this basis.

b. Failure of Proof

Salomon next argues that it is entitled to summary judgment because under *Continental Casualty*, plaintiffs must prove that Salomon knowingly participated in NISA's knowing breach of its fiduciary duties. In other words, there must be evidence that NISA, as APT's fiduciary, caused APT to enter into the Fee Agreements with knowledge that they were prohibited transactions and that Salomon participated in the transactions knowing they were prohibited and that NISA was breaching its fiduciary duty.

Here, plaintiff has provided proof that NISA was a fiduciary of the plan and that it caused APT to enter into the participation interest transactions. Moreover, there is sufficient evidence in the record relating to Salomon's earlier provision of services to NISA/APT to suggest that NISA knew or should have known that Salomon was a "person providing services to [APT]."[19] Nothing in the statute suggests that NISA had to have actual knowledge that the transaction was in fact illegal or that NISA qualified, legally, as a party in interest. Thus, the record is sufficient to raise a question of fact as to whether NISA knew or should have known that the transaction was a sale or exchange of property between the plan and a party in interest or for the benefit of a party in interest.

Moreover, as discussed above, Salomon's liability is premised on a direct violation of ERISA, and not, as Salomon argues, on secondary liability for knowing participation in NISA's breach. While Congress has made clear that § 1106 does not create a strict liability cause of action in the sense that even a blind transaction would constitute a prohibited transaction, *see* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in*, 1974 U.S.C.C.A.N. at 5087, actual knowledge that the transaction was in fact prohibited does not appear necessary. Rather, knowledge that it was a service provider to an employee pension benefit plan and was engaging in a transfer of property with the plan or its fiduciary is enough. Plaintiffs' evidentiary submissions are sufficient to satisfy this standard. Salomon is not entitled to summary judgment with respect plaintiffs' claims that Salomon has violated § 1106(a)(1)(A) and (D).

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[19] ERISA broadly defines the term "party in interest" to include, among other things, "a person providing services to [a] plan." 29 U.S.C. § 1002(14)(B).

c. Availability of Restitution as a Remedy

Alternatively, and without much elaboration, Salomon argues that plaintiffs are barred from obtaining restitution because they affirmed the purchase of the Fee Agreement participation interests when they opted to sell APT's claims that were filed in MOA's bankruptcy proceeding. Plaintiffs respond that, as fiduciaries of APT, they were merely satisfying their duty to mitigate damages and to rid APT of an imprudent investment.

As a general rule, if a person continues to perform a contract after discovering facts which make it voidable (e.g., fraud), it is inferred that he has affirmed the contract and he is no longer entitled to avoid it and obtain restitution. *See* Restatement of Restitution § 68 (1937). Plaintiffs' sale of APT's claim in MOA's bankruptcy proceeding, however, is more akin to an attempt to preserve what APT had already invested than it is to continued performance. Such acts of preservation do not extinguish the right to restitution. *Id.* § 68 comment b. Moreover, the rule regarding affirmance of the contract appears, at least in part, to arise out of the requirement that the person seeking restitution tender back or at least offer to tender back the subject matter of the contract. *Soderberg v. Gens*, 652 F. Supp. 560, 565 (N.D. Ill. 1987). In this way, any potential unjust enrichment of the rescinding party is avoided. *See* Restatement of Restitution § 65. Acts of affirmance would necessarily be in conflict with the ability to tender. Here, however, plaintiffs claim that Salomon's misrepresentations caused NISA to purchase participation interests that were in fact worthless. As a result, no offer to restore the participation interests to Salomon is required. *Id.* § 65 comment e.

The court concludes, in light of the above principles, that the sale of APT's bankruptcy claims does not prevent this action for restitution.

d. Plaintiffs' Cross Motion

The conclusion that Salomon is not entitled to summary judgment, however, does not necessarily entitle plaintiffs to a favorable ruling with respect to their cross motion on count II. Salomon argues that plaintiffs' motion should be denied because there is a genuine issue of material fact regarding the applicability of Prohibited Transaction Exemption 75-1 ("PTE 75-1") in which the DOL and the Internal Revenue Service established a safe harbor for certain "customary securities transactions." PTE 75-1 provides that the prohibitions of § 1106 will not apply to "any purchase or sale of a security between an employee benefit plan and a broker-dealer . . . if [the enumerated] conditions are met." 40 Fed. Reg. at 50847. Plaintiffs respond that Salomon is not entitled to the protections of PTE 75-1 because the participation interests sold to APT are not "securities" and, even if they were, there is no evidence that the conditions specified in PTE 75-1 are satisfied.

The parties agree that the definition of a "security" in the federal securities laws controls whether the participation interests in the Fee Agreements constitute securities within the meaning of PTE 75-1. *See* 15 U.S.C. §§ 77b(1) and 78c(10). These statutes provide that a "security" is "any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement, . . . investment contract, . . . or in general, any instrument commonly known as a security . . . . *Id.* § 78c(10).[20] In addition to ordinary stock and bonds, it is intended to encompass "countless and

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[20] The definition of "security" set forth in 15 U.S.C. § 77b(1) is virtually the same and, in practice, the two definitions are considered interchangeable. *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 411 n.5 (7th Cir. 1988), *citing, Tcherepnin v. Knight*, 389 U.S. 332, 335-36, 88 S. Ct. 548, 553 (1967).

variable schemes devised by those who seek the use of the money of others on the promise of profits . . . ." *SEC v. W.J. Howey, Co.*, 328 U.S. 293, 299, 66 S. Ct. 1100, 1103 (1946). It extends to many uncommon and irregular instruments, not just instruments traded at securities exchanges. *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S. Ct. 1220, 1223 (1982). Nevertheless, the statute's broad sweep is tempered by the fact that "Congress intended the securities laws to cover those instruments ordinarily and commonly considered to be securities in the commercial world. . . ." *Id.* Moreover, instruments technically falling within the statutory description will not be considered a security if the context requires otherwise. 15 U.S.C. §§ 77b(1) and 78c(10); *Marine Bank*, 455 U.S. at 558, 102 S. Ct. at 1225.

As an initial matter, Salomon has moved to strike the affidavits of two law professors submitted in support of plaintiffs' motion. In the affidavits, the professors, both experts in securities law, set forth their opinions that the four Fee Agreements are not securities and that the sale of the participation interests (via the Assignments) do not constitute the sale of securities. While expert legal testimony may be appropriate in some circumstances, the court concludes that the affidavits of professors Coffee and Seligman go beyond that which proper. Rather than express their opinions regarding significant factual characteristics of securities in general, Professors Coffee and Seligman have started with certain assumptions about the legal definition of a security (presumably provided to them by plaintiffs' counsel) and then proceeded to evaluate the specific evidence in this case to determine what the "facts" are. In short, while the affidavits carry the added imprimatur of securities experts, they offer nothing more than legal argument typically supplied by a party's legal representative. On a motion for summary judgment, it is the duty of the court to construe the law, interpret the evidence in the appropriate manner and to determine whether there is any genuine issue of material fact

which necessitates a trial. Because the affidavits of plaintiffs' legal experts usurp this judicial function, they will be stricken.[21]

Salomon asserts that there is a genuine issue of fact as to whether the sale of the participation interests to APT constituted the sale of securities because the participation interests qualify as any one of four separate instruments contained in the statutory definition of security. More specifically, Salomon asserts that the participation interests qualify as "evidence of indebtedness," "participations in a profit sharing agreement," "investment contracts," or "other instruments commonly known as securities."

In *Howey*, 328 U.S. at 299, 66 S. Ct. at 1103, the Supreme Court established the test for determining whether a particular transaction constitutes an "investment contract" security. The salient characteristics of such a security are a transaction whereby a "person invests his money in a common enterprise and is led to expect profits solely from the effort of the promoter or a third party." *Id.* While this test does not apply to all the types of instruments set forth in the statutory definition, the Supreme Court later recognized that it is equally applicable to the general category of "instrument commonly known as a security." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691 n.5, 105 S. Ct. 2297, 2304-05 n.5 (1985). Further, the Seventh Circuit has held that the same requirements apply to the category of "participations in a profit sharing agreement." *Secon Service System, Inc. v. St.*

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[21] Anticipating the worst, Salomon submitted a counteraffidavit from a third law professor who opined that both the Fee Agreements and the Assignments constitute securities. Salomon states that this counteraffidavit is only to be considered in the event that the affidavits of plaintiffs' legal experts are not stricken. In light of the above ruling, the court has not considered this counteraffidavit.

Joseph Bank & Trust Co., 855 F.2d 406, 411 (7th Cir. 1988), *citing, Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 102 (7th Cir. 1977). Thus, these three categories may be considered together.[22]

To avoid summary judgment under the *Howey* test, there must be some evidence that there has been an 1) investment of money, 2) in a "common enterprise," 3) with an expectation of profits, 4) derived primarily from the efforts of a third party. Plaintiffs assert that Salomon cannot establish that the second element because APT was the only investor in the participation interests. Although there is a split among the circuits, the Seventh Circuit has consistently adhered to the belief that "horizontal commonality" is a necessary requirement to establish the common enterprise element of the *Howey* test.[23] *See e.g., SEC v. Lauer*, 52 F.3d 667 (7th Cir. 1995); *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016 (7th Cir. 1994); *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972). This means that the transaction must involve not only a pooling of interests between a developer/promoter and an investor, but also among several investors. In other words, investors must have pooled their resources to obtain an undivided interest in a common asset from which they expect to obtain a profit based primarily on the efforts of others. Based on the record before this court, however, APT was the only actual investor in the participation interests.

[22] Salomon relies on *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945 (1990), to argue that the *Howey* test does not apply when an instrument falls within any category of the statutory definition (other than investment contract), rather the instrument is presumed to be a security unless the context indicates otherwise. This argument is not persuasive. In *Reves*, the court reconfirmed its earlier statement in *Landreth* to the effect that the *Howey* test cannot be said to apply to every type of instrument listed in the statute. It then went on to establish its own test for "notes." Nothing in *Reves*, however, suggested that the Court believed the *Howey* test was inappropriate for participation interests or other instruments commonly known as securities.

[23] As pointed out in *Wals*, the Fifth, Eighth and Tenth circuits appear to require only "vertical commonality," which is present when the interests of the promoter and an individual investor are connected. *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016, 1017 (7th Cir. 1994).

Salomon argues that APT was not the only investor because Salomon retained an undivided 5% interest in three of the four Fee Agreements and, like APT, expected to receive it share of MOA/Best Inns' profits associated with that interest. Additionally, Salomon points out, MOA/Best Inns only agreed to pay Salomon a portion of the profits from the motel operations and, therefore, MOA/Best Inns also had an undivided, shared expectation of profit. This argument is unpersuasive. The clear implication of this circuit's interpretation of the *Howey* test is that several investors must pool their resources with the expectation that another's use of that money will produce a profit or return on their investment. Under the record in this case, Salomon cannot be characterized as such a passive investor who has jointly pooled its funds with APT. Each of the Fee Agreements expressly provide that any payments to be made are consideration for Salomon's work in placing the mortgage notes issued by MOA/Best Inns. This suggests that money Salomon expected to receive was compensation for services performed, not a return or profit on an investment. Although Salomon presents evidence that the impetus behind the Fee Agreements was Salomon's decision to place its own money at risk by serving as a principal and purchasing the underlying mortgage notes (rather than simply acting as a placing agent), this evidence does not alter the essential character of the payments to Salomon under the Fee Agreements. Salomon's "investment" was in the mortgage notes, the Fee Agreements were compensation for its services. Similarly, Salomon's rather novel argument that MOA/Best Inns' retention of a certain percentage of its prof-

its makes MOA and Best Inns co-investors for purposes of establishing horizontal commonality is not convincing. Clearly, profit to the companies would result from their operation and management of the motel properties, not from a passive investment of money therein.

Even if APT were the only investor in the participation interests, Salomon further argues that *Lauer*, the Seventh Circuit's most recent "common enterprise" case, essentially eliminated the requirement of actual horizontal commonality. In *Lauer*, the defendant promoter of a fraudulent investment program attempted to avoid application of the securities laws by arguing that he only persuaded one person to actually invest in the scheme. The court concluded that it was appropriate to judge the promoter's offering as what he represented it to be. In other words, where part of the alleged fraud is that the instrument for sale is a security when it is nothing of the kind, the defrauding promoter is estopped to deny the existence of a security. In reaching it conclusion, the court reasoned that "it is the character of the investment vehicle, not the presence of multiple investors, that determines whether there is an investment contract." *Lauer*, 52 F.3d at 670. Although the context in which *Lauer* was decided is distinct from the present case, the reasoning of the court suggests that horizontal commonality cannot be determined solely from the *actual* presence of multiple investors. Rather, the court must assess the intended character of the instrument. In this way, the existence of security status is protected against the fortuity that only one person in fact chooses to invest.

Here, Salomon has offered evidence that an offering memorandum was prepared with respect to the sale of the participation interests in the first three Fee Agreements and that such a memorandum was drafted but never completed with respect to Fee Agreement IV. The record also reveals that NISA/APT received the offering memoranda. All of these memoranda referred to multiple investors. Further,

Salomon personnel have testified that other potential investors were contacted with respect to participating in Fee Agreement I and that Salomon was prepared to seek out other investors if APT did not buy the participations in Fee Agreements I-IV. These pieces of evidence, while not particularly persuasive, are sufficient at this juncture to raise a question of fact regarding the intended character of the participation interests. Thus, on this record, there remains a genuine issue as to whether the participation interests are securities within the meaning of PTE 75-1.

But, plaintiffs argue, even if the participation interests might be a security, summary judgment is appropriate because PTE 75-1 only exempts securities sold under certain conditions and there is no evidence that one of those conditions is satisfied.[24] More specifically, they assert that Salomon has not offered any evidence that the transactions were as favorable to APT as an arms-length transaction with an unrelated third party would have been. A review of the record, however, reveals that Salomon has provided at least some proof indicating that an unrelated party might have paid a similar price for the participation interests. For example, for unrelated purposes, Salomon itself valued the Fee Agreements at approximately the value which the parties eventually ascribed to them. While such evidence may not ultimately be sufficient to carry the day, when taken in a light favorable to Salomon, it is enough to avoid summary judgment. Whether the transaction was as favorable to APT as an arms-length transaction would have been necessarily involves a highly factual determination of the fair market value of the participation interests. The court is not prepared to

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[24] Plaintiffs' argument that PTE 75-1 is inapplicable because the Fee Agreements were not "customary" securities and were not subject to close regulation lacks force. Those factors are not required to qualify for the exemption. *See* 40 Fed. Reg. at 50847.

conclude that there is no genuine issue of fact in that regard. Because there remains a triable issue of fact with respect to the applicability of PTE 75-1, plaintiffs also are not entitled to summary judgment with respect to count II.

Count III

Count III alleges that Salomon knowingly participated in NISA's breach of its fiduciary duties to APT by selling the interests in the fee agreements to NISA for APT's benefit. In other words, plaintiffs contend that Salomon is secondarily liable for its knowing participation in NISA's involvement in a § 1106 prohibited transaction. Salomon argues that it is entitled to summary judgment because *Mertens* and *Continental Casualty* make clear that ERISA does not provide a cause of action against nonfiduciaries for knowing participation in another person's fiduciary breaches. Plaintiffs respond that *Mertens* and *Continental Casualty* are not controlling in light of Salomon's status as a party in interest.

Plaintiffs' attempt to avoid the rule of *Continental Casualty* is without force. As discussed above, the Seventh Circuit, relying on the *Mertens* dicta, specifically held that nonfiduciaries cannot be found liable for knowing participation in another person's fiduciary breaches. This rule is equally applicable to nonfiduciaries who also happen to be parties in interest. While this may appear to be at odds with the above discussion regarding count II, it is not. The confusion stems from the fact that the alleged fiduciary breach happens to be NISA's participation in a § 1106 prohibited transaction. As discussed above, nonfiduciary parties in interest may be held liable under § 1132 for their own involvement in a prohibited transaction because § 1106 can be read to affirmatively impose an obligation of parties in interest to avoid such transactions. Their status as a party in interest, however, does not subject such persons to derivative liability for another's violation of ERISA. Thus, to the extent that Salomon participated in a prohibited transaction, it

may be found directly liable under count II. Salomon cannot otherwise be held accountable to plaintiffs for damages as alleged in count III. For these reasons, Salomon is entitled to summary judgment with respect to count III.

Statute of Limitations

Salomon further argues that, at the very least, the running of the statute of limitations entitles it to summary judgment with respect any cognizable ERISA claim arising out of the sale of the participation interests in Fee Agreements I and II. A plaintiff must bring claims for ERISA violations within six years after the date of the last action which constituted the violation or three years after the plaintiff had actual knowledge of the alleged violation, whichever is earlier. 29 U.S.C. § 1113. Because APT knew the parties to the transactions and their relationship to the plan at the time NISA purchased the participation interests in Fee Agreements I and II (on October 28, 1987 and April 28, 1988, respectively), Salomon submits that plaintiffs had actual knowledge of the alleged § 1106 violation at the time of the closings. Despite this knowledge, plaintiffs did not commence this action until March 27, 1992. Plaintiffs respond that Ameritech's employees and NISA did not understand that any of the participation interests violated ERISA until sometime in 1990 and that Salomon repeatedly misled NISA and APT regarding the viability of the MOA/Best Inns portfolios.

Actual knowledge under 29 U.S.C. § 1113 only requires knowledge of the essential facts of the illegal transaction, not its illegality. *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992). Nevertheless, mere notice that something is awry is not enough, the plaintiff must have specific knowledge of the facts that would establish the breach of duty upon which he sues. *Radiology Center, S. C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222 (7th Cir. 1990). Yet, as Salomon has so carefully pointed out, here there are factual questions whether the sales of the

participation interests fall within the safe harbor provisions of PTE 75-1. Assuming that the participation interests do not constitute securities, as plaintiffs argue, then knowledge of the essential facts would seem to require no more than knowing the parties to the transaction and their relationship to APT. Plaintiffs do not argue that they were unaware of those facts at the time of the closings on Fee Agreements I and II. On the other hand, if it is determined that the participation interests are securities, then the essential facts of which plaintiffs would need specific knowledge would include information that the transaction was not as favorable to APT as an arms-length transaction with an unrelated third party would have been. Plaintiffs' evidence that Salomon misled NISA and APT regarding the viability of the MOA/Best Inns portfolios until sometime in 1990 creates a question of fact as to when plaintiffs gained that knowledge which was essential to their claim. Any ruling on the statute of limitations issue is, therefore, premature.

Salomon's Counterclaims for Contribution

In its counterclaims, Salomon alleges that if it is liable to APT for any breach of duty (count I) or for any transactions which violated ERISA § 1106 (count II), then it is entitled to contribution from Ameritech because Ameritech similarly must have breached its duties to APT. Plaintiffs assert that there is no right of contribution under ERISA, but even if there is, Ameritech is entitled to summary judgment in its favor because the undisputed evidence establishes that NISA controlled the decision to invest in the Fee Agreements and to the extent that the available relief is equitable, contribution is inappropriate.

In a well reasoned ruling on plaintiffs' earlier motion to dismiss Salomon's counterclaims, Judge Aspen rejected plaintiffs' argument that there is no right to contribution under ERISA. The court is not inclined to revisit this issue. Plaintiffs have failed to identify any specific changes in the

law that would affect that ruling. Moreover, regardless of whether there may be some right to contribution under ERISA, Salomon has no such right here. In light of the above rulings, the only remaining ERISA cause of action is Salomon's alleged violation of § 1106 based on its status as a party in interest and its participation in prohibited transactions. As a result, the recovery plaintiffs seek is limited to "appropriate equitable relief" such as restitution of the amount by which Salomon has been unjustly enriched. Unlike the damages that may have been available if Salomon had been a fiduciary of APT, "liability for [its] own ill-gotten gains cannot be shifted, even to one more culpable." *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 744 F. Supp. 29, 33 (D. Mass. 1990). This distinction makes sense. While a plaintiff's damages may result from the actions of more than one defendant, when recovery is based on the amount by which the defendant is unjustly enriched, there is no similar responsibility to be apportioned. The defendant unfairly received whatever it received. Thus, even if Ameritech breached a fiduciary duty vis a vis APT and may itself be liable in damages for its own breach of care, Salomon cannot shift the burden of paying whatever amount it may have unfairly received as a result of its alleged violation of ERISA § 1106.[25] Plaintiffs are entitled to summary judgment with respect to Salomon's counterclaims for contribution.

ORDER

For the foregoing reasons, it is hereby ordered as follows:

1. Defendants' Motion to Strike Affidavits of Plaintiffs' Proposed Law Professor "Experts" is granted.

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[25] This conclusion makes it unnecessary to consider plaintiffs' evidentiary argument that only NISA made the decision to invest in the Fee Agreements.

2. Defendants' Motion to Strike Certain Evidence relied upon in plaintiffs' July 11, 1995 12N Response is denied as moot in light of the other rulings contained herein.

3. Defendants' Motion for Summary Judgment on Plaintiffs' Federal Claims is granted as to counts I and III of the Second Amended Complaint and as to any claims contained in count II which are premised on an alleged breach of fiduciary duty. It is denied in all other respects.

4. Plaintiffs' Motion for Partial Summary Judgment is denied with respect to count II of the Second Amended Complaint and granted with respect to defendants' counterclaims for contribution.

5. The parties are directed to engage in good faith settlement discussions in an attempt to mutually resolve all remaining claims and if, despite the parties' sincere efforts, a settlement is not reached, the parties are further directed to agree on a briefing schedule for Salomon's Alternative Motion for Summary Judgment on Plaintiffs' State Law Claims. This matter is set for status on July 15, 1996 at 2:00 p.m.

/s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW
United States Magistrate Judge

Dated: June 13, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON, Plaintiffs,	) CIVIL ACTION) No. 92 C 5883
vs.	) Magistrate) Judge Lefkow
SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP., Defendants.	) DOCKETED) SEP. 10, 1996

[PROPOSED] ORDER MODIFYING THIS COURT'S DECISION TO CONFIRM THAT STATEMENTS OF THE FACTS IN THE DECISION CONSTITUTE A STATEMENT OF THE NON-MOVING PARTY'S EVIDENCE

It is hereby ordered that this Court's Memorandum Decision and Order, dated June 13, 1996 and filed June 18, 1996, is modified by the addition of the following paragraph to the bottom of page 3 of the Memorandum Decision

> Unless otherwise expressly stated, statements of the facts in the section of the Decision entitled "Factual Background" or elsewhere in the Decision constitute statements of the non-moving party's evidence or reasonable inferences therefrom viewing the evidence in the non-moving party's favor, and do not constitute rulings or findings of fact by this Court.

/s/Joan H. Lefkow
U.S.M.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIS TRUST, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 92 C 5883
	)	
SALOMON BROTHERS, INC., et al.,	)	
	)	
Defendants.	)	

RULING ON MOTION TO RECONSIDER OR CERTIFY FOR IMMEDIATE APPEAL

Joan H. Lefkow, Magistrate Judge

Salomon has asked the court to reconsider two portions of its June 13, 1996 Memorandum Decision in light of the Supreme Court's recent decision in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1996 WL 305742 (June 10, 1996). Salomon urges that *Lockheed*'s discussion of ERISA § 1106(a) makes it clear that there is no private right of action against a nonfiduciary party in interest who engages in a transaction prohibited by § 1106, but even if there were, that it is limited to circumstances where a nonfiduciary has knowingly participated in a fiduciary's violation of § 1106. As a result, Salomon argues, the Seventh Circuit's decision in *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994), would bar the claim.

As previously stated in open court, the *Lockheed* decision does not necessitate reconsideration of this court's June 13 Decision. Although the Court in *Lockheed* found that to

sustain a claim under § 1106(a), a plaintiff must show that a fiduciary caused the plan to engage in one of the transactions identified in that section, it did not state or even suggest that a nonfiduciary party in interest who benefitted from such an impermissible transaction cannot be held liable for restitution once such a showing is made. *Lockheed*, 116 S. Ct. at 17888-89, 1996 WL 305742, at *4. To the contrary, the Court specifically noted that the appellate court in *Lockheed* "was not necessarily wrong in saying that 'a party in interest who benefitted from an impermissible transaction can be held liable under ERISA.'" *Id.* at n.3. The Ninth Circuit's error was that it found the employer party in interest liable without even asking whether a fiduciary caused the plan to enter into the transaction, i.e., there was insufficient proof that the transaction from which the party in interest benefitted was impermissible under § 1106(a).

As noted in the June 13 Decision, plaintiff has provided some proof that NISA was a fiduciary of the plan, that NISA caused APT to enter into the transactions at issue and that Salomon is a party in interest who benefitted from the transactions. Assuming these facts ultimately are proved, the transactions would be impermissible because they were outside the scope of NISA's lawful authority. Under such circumstances, *Lockheed* does not preclude holding Salomon liable under ERISA for restitution of the benefits it received from the transactions. The court further disagrees that the Court's reasoning in *Lockheed* effectively limits recovery against nonfiduciary parties in interest to those situations where the party in interest "knowingly participates" in the fiduciary's breach of its fiduciary duties. For the reasons amply discussed in the June 13 Decision, the court concludes that nonfiduciary parties in interest may be held responsible for their direct participation in or as beneficiary of § 1106(a) transactions. This is separate from the question whether they may be held liable for their knowing aid to the fiduciary in causing the plan to engage in the transaction—a question that

is not before this court. The motion for reconsideration will be denied.

Alternatively, Salomon seeks certification of two specific issues for appeal to the Seventh Circuit Court of Appeals under 28 U.S.C. § 1292(b). As a general matter, certification of a question for interlocutory appeal is the exception, not the rule. Nevertheless, a district court has discretion to grant such a motion where 1) the matter to be appealed involves a controlling question of law, 2) on which there is substantial ground for difference of opinion, and 3) immediate appeal could materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Plaintiffs' have not seriously disputed the first of these factors. Indeed, the determination from which Salomon seeks leave to appeal—the availability and scope of a private right of action under ERISA for equitable relief against nonfiduciary parties in interest—if incorrect, would seemingly lead to the dismissal of plaintiffs' only remaining federal claim. The second factor—whether there is a substantial ground for difference of opinion on the issue(s) be appealed—is hotly disputed. Salomon, of course, believes that under *Lockheed* a private right of action against a nonfiduciary party in interest is nonexistent or, at the very least, its existence is an open question. Plaintiffs, by contrast, believe that the decision in *Lockheed*, merely confirms that which the circuit courts, at least those which have considered the issue, have already recognized, namely, that there is such a private right of action. Although a number of circuit courts have recognized a cause of action and this court was ultimately persuaded to agree, that alone does not demonstrate that there is no substantial ground for difference of opinion. In ruling on the parties' cross-motions for summary judgment, each side offered an abundance of thoughtful arguments to support their respective positions. Thus, even though this court concluded that plaintiffs' arguments and authority were more persuasive, it cannot be

said that the arguments supporting an opposite conclusion were insubstantial.

Nevertheless, before an issue can be certified for appeal, the district court must further be convinced that immediate appeal from the order in question will materially advance the ultimate termination of the litigation. The court does not believe that Salomon has made such a showing. If the appellate court upholds this court's ruling, it would offer little benefit in terms of simplifying the issues for trial and it would disadvantage both parties by delaying the final resolution of a matter that has already been in litigation more than four years, before two different judges. Even assuming that the Seventh Circuit were to reverse the June 13 Decision, it is highly likely that the parties would move forward toward a trial of the remaining issues. While the burden of trial might be shifted to another court, e.g., state court, an immediate appeal would not certainly advance the ultimate termination of the litigation. Indeed, the delays attendant with familiarizing yet another judge with the complex facts and legal issues surrounding this matter suggest that regardless of the outcome, an immediate appeal would be a disservice to the litigants and the general administration of justice.

ORDER

For the reasons stated, it is hereby ordered that defendant's motion for reconsideration of this court's decision and order of June 13, 1996 or, in the alternative, to amend the court's order so as to certify it for interlocutory appeal [Docket Nos. 196-1 and -2] is denied in its entirety. Plaintiffs are further directed to file their response to Salomon's Alternative Motion for Summary Judgment on Plaintiffs' State Law Claims [Docket No. 122] on or before October 25, 1996, and defendant shall file any reply thereto on or before November 8, 1996.

ENTER:

/s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW

Dated: September 24, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIS TRUST, et al., Plaintiff, v. SALOMON BROTHERS, INC., et al., Defendant.	Case No. 92 C 5883

MEMORANDUM DECISION

Joan H. Lefkow, Magistrate Judge:

This suit seeks recovery for alleged violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and state law. Before the court is defendants' motion for summary judgment with respect to plaintiffs' three state law claims.[1] In an earlier ruling, this court denied defendants' motion for summary judgment with respect to Count II of plaintiffs' Second Amended Complaint which seeks to hold defendants liable for participating, as

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[1] As a result of earlier rulings by the court, Counts II and VIII-X of the Second Amended Complaint are all that remain at issue. The three state law claims, set forth in Counts VIII-X, allege that defendants engaged in common law fraud, statutory fraud under the Illinois Consumer Fraud Act and negligent misrepresentation.

parties in interest, in transactions prohibited by ERISA § 1106(a). In light of that ruling, defendants urge that the remaining state law claims are preempted by ERISA § 1144(a). Alternatively, defendants assert that Counts VIII through X fail on their merits. For the reasons set forth below, the Court concludes that § 1144(a) precludes the alleged state law remedies and, therefore, it is unnecessary to consider defendants' alternative arguments.

BACKGROUND[2]

Ameritech Corporation ("Ameritech") sponsors and administers two pension plans which qualify as employee pension benefit plans under ERISA. The plans are funded through Ameritech Pension Trust ("APT"). Each plaintiff herein is a fiduciary of APT within the meaning of ERISA. During the 1980's and thereafter, defendants furnished services to the plans by acting as a broker-dealer on numerous debt and equity transactions for the plans. Between 1987 and 1989, defendants further offered to sell APT their interest in four separate fee agreements which granted them rights to participate in the net cash flow, sale or refinancing proceeds, and property appreciation associated with certain motel properties. APT, using Ameritech plan assets, purchased either 95% or 100% of defendants' interest in each of the fee agreements.

Plaintiffs allege that, as a result of defendants' service to the plans, defendants were parties in interest to the plans and therefore, § 1106(a) categorically prohibited each of the fee agreement transactions.[3] Plaintiffs further allege that in an

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[2] This brief description is solely intended to provide context and clarity. The court assumes the reader's familiarity with the facts set out in several earlier opinions in this case.

[3] The pertinent portions of § 1106(a) provide that

(1) A fiduciary with respect to a plan shall not cause

(...continued)

effort to induce APT's purchase of defendants' interests in the third and fourth fee agreements, defendants deliberately and/or negligently withheld certain adverse information concerning the performance of the underlying motel properties, as well as adverse developments affecting the value of the first two fee agreements. Plaintiffs submit that during negotiations for and after the closing of the transactions, defendants continued to make intentional falsely positive representations regarding the motel properties and their investment value or otherwise failed to disclose information which would have alerted plaintiffs to the precarious condition of the investments.

ANALYSIS

ERISA § 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they ... relate to any employee benefit plan" covered by the statute. 29 U.S.C. §

> the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> * * * *
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(A)(1)(A) & (D). In this court's Memorandum Decision of June 13, 1996, the court determined that despite the absence of explicit language in § 1106(a), ERISA's legislative history and the case law interpreting § 1106(a) indicate that nonfiduciary parties in interest have a duty to abstain from the transactions prohibited by that provision. Further, ERISA's civil enforcement provisions authorize a private right of action against nonfiduciary parties in interest who engage in § 1106 transactions. See 29 U.S.C. § 1132(a)(3).

1144(a). This provision reflects Congress' intent to subject plans and plan sponsors to a uniform body of benefits law. *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645, 656-57, 115 S.Ct. 1671, 1677 (1995), *citing, Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484 (1990). The Supreme Court has acknowledged that the plain language of § 1144(a) is expansive and that a law may "relate to" an employee benefit plan as long as it "has a connection with or reference to" such a plan. *Travelers*, 514 U.S. at 656, 115 S.Ct. at 1677, *citing, Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900 (1983). Thus, preemption may occur even where a state law is "not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand*, 498 U.S. at 139, 111 S.Ct. at 483. Moreover, common law causes of action, like those at issue herein, are included within the "state law" which may be preempted. *Id.* at 142, 111 S.Ct. at 484.

Nevertheless, recent Supreme Court decisions teach that the reach of ERISA's preemption clause is not boundless. *See De Buono* v. *NYSA-ILA Medical and Clinical Services Fund*, 117 S.Ct. 1747, (1997); *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, 117 S.Ct. 832 (1997); *Travelers*, 514 U.S. at 645, 115 S.Ct. at 1671. Instead, courts must start with the presumption that federal law does not supplant state law unless Congress clearly and manifestly intended to do so and must use the objectives of the ERISA statute as a guide to that intent. *De Buono*, 117 S.Ct. at 1751; *Travelers*, 514 U.S. at 654, 115 S.Ct. at 1676-77. If a state law of general applicability has no more than an incidental effect on an ERISA plan, such as the indirect economic influence at issue in *De Buono*, *Dillingham* and *Travelers*, it will not be preempted.

In light of the above principles, it has been recognized that § 1144(a) preempts common law causes of action brought by

ERISA plan participants or beneficiaries seeking benefits or challenging allegedly improper handling of claims. *See, e.g., Pilot Life Insur.* v. *Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987). Likewise, state laws which, by word or effect, mandate particular employee benefit structures or administration have been determined to be "related to" ERISA plans. *See, e.g., FMC* v. *Holliday*, 498 U.S. 52, 111 S.Ct. 403 (1990). Other courts have looked to whether the state law regulates a relationship that is also regulated by ERISA or provides an alternative enforcement mechanism to one provided by ERISA. *See, e.g., General American Life Insur. Co.* v. *Castonguay*, 984 F.2d 1518 (9th Cir. 1993) (relationships); *Ingersoll-Rand*, 498 U.S. at 142, 111 S.Ct. at 484 (alternative enforcement mechanism).

Applying these preemption principles to the circumstances of this case, it clear that the area of tort law asserted in Counts VIII-X has been a field traditionally occupied by the states. As such, defendants bear a considerable burden to overcome the starting presumption against preemption. *De Buono*, 117 S.Ct. at 1752. This court concludes, however, that ERISA's goals and its legislative history evidence Congress' manifest intent to preempt state tort law insofar as it applies to parties in interest who have engaged in transactions prohibited by ERISA § 1106. This court previously determined that ERISA authorizes a cause of action against nonfiduciary parties in interest who have engaged in § 1106(a) prohibited transactions. *See* Memorandum Decision of June 13, 1996. As the Supreme Court has stated, one of Congress' primary concerns in enacting ERISA was the mismanagement of plan funds. *Massachusetts* v. *Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 1673 (1989). To that end, Congress chose, among other things, to flatly prohibit certain transactions which it believed to be particularly problematic. *Comm'r. of Internal Revenue* v. *Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160, 113 S.Ct. 2006, 2012 (1993) ("Congress' goal [in §

1106(a)] was to bar categorically a transaction that was likely to injure the pension plan."). Moreover, Congress specifically authorized plans to seek equitable relief from parties in interest, like defendants, who have allegedly engaged in such transactions. *See* 29 U.S.C. § 1132(a)(3).

ERISA's legislative history[4] provides further insight regarding the extent to which Congress intended to preempt state law when a case involves parties to a § 1106 prohibited transaction. As discussed in this court's June 13, 1996 Memorandum Decision, Congress considered, but rejected, the idea of permitting plaintiffs to recover legal damages from nonfiduciary parties in interest who engaged in prohibited transactions. Instead, ERISA expressly limits the available remedy to equitable relief. 29 U.S.C. § 1132(a)(3). To allow plaintiffs to proceed with their state law claims, then, would thwart the balance that Congress struck. As the Supreme Court has stated, "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." *Pilot Life*, 481 U.S. at 54, 107 S.Ct. at 1556-57.

Plaintiffs argue that the policy considerations at issue in their fraud and negligent misrepresentation claims are not the same concerns that ERISA is meant to address. While plaintiffs' federal and state claims certainly have their differences, e.g., the required degree of intent, plaintiffs' state law claims arise out of and are inextricably intertwined with the alleged prohibited transactions. Moreover, it must be recognized that Congress struck a bargain in this regard. It

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[4] The specifics of the legislative history, which were discussed in detail in this court's June 13, 1996 Memorandum Decision, will not be set out here.

provided parties such as plaintiffs here with broader protection than would otherwise be available, e.g., under § 1106 defendants are held to a standard that approximates strict liability when they participate in a prohibited transaction. In exchange, however, it took away plaintiffs' right to legal relief from parties in interest who have engaged in prohibited transactions. The court concludes that the rejection of legal relief further confirms Congress' intention to make § 1132(a)(3) plaintiffs' exclusive remedy, thus preempting state law to the extent that it might provide additional remedies related to prohibited transactions. *Accord Contract Cleaning Maintenance, Inc.* v. *Marks*, 1996 WL 264724, *2-3 (N.D. Ill. May 15, 1996). To the extent that plaintiffs have cited decisions where state law claims were not preempted vis a vis third parties who provided services to an ERISA plan, e.g., negligent performance of their services, those decisions are inapplicable to the specific circumstances here. None involved a service provider's involvement in a transaction specifically regulated and prohibited by ERISA as is alleged here.

ORDER

For the reasons stated above, defendants' alternative motion for summary judgment on plaintiffs' state law claims [Docket No. 122-1] is granted with respect to Counts VIII-X of the Second Amended Complaint.

ENTERED:

/s/ Joan Humphrey Lefkow
JOAN HUMPHREY LEFKOW
United States Magistrate Judge

Dated: September 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON, Plaintiffs,	) CIVIL ACTON) NO. 92 C 5883)) MEMORANDUM AND ORDER) ON DEFENDANTS' RENEWED) MOTION (1) TO AMEND JUDGE) LEFKOW'S JUNE 1996 ORDER) TO CERTIFY THE ORDER FOR) INTERLOCUTORY APPEAL PUR-) SUANT TO 28 U.S.C. § 1292
vs.	) (b), OR (2) TO RECONSIDER) RULINGS ON TWO CONTROL-
SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP., Defendants.	) LING LEGAL ISSUES IN JUDGE) LEFKOW'S JUNE 1996 ORDER)

The plaintiffs filed this action against the defendants in September 1992. Through numerous motions and orders, most of the plaintiffs' original claims have been dismissed. At the present time, only one claim remains. The case has been assigned to me from Judge Lefkow, and the defendants have filed a renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order. Both parties have filed briefs, and I have reviewed the relevant documents in this case. I shall grant the defendants' renewed motion to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal.

ANALYSIS

The defendants motion to certify for interlocutory appeal involves two issues:

1) Does 29 U.S.C. § 1132(a)(3) affirmatively authorize a private right of action against a nonfiduciary party-in-interest who participated in a transaction with a pension plan prohibited by 29 U.S.C. § 1106(a), and

2) If so, is proof that such nonfiduciary party-in-interest knew it was a service provider to a pension plan and was engaged in a transfer of property with the plan or its fiduciary sufficient to hold such nonfiduciary liable under such private right of action—even if there is no proof that such nonfiduciary (i) knew that the transaction was a nonexempt prohibited transaction in violation of 29 U.S.C. § 1106(a) and (ii) knew that the fiduciary had caused the plan to engage in such transaction in breach of its fiduciary duties.

The statutory authority allowing for interlocutory appeals is found in 28 U.S.C. § 1292(b). This section gives the district court discretion to grant a motion for interlocutory appeal in cases where (1) the matter being appealed involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) where an immediate appeal from the order may materially advance the ultimate termination of the litigation.

I concur with Judge Lefkow's finding that the matters being appealed involve controlling questions of law and that even though she determined that a private right of action exists under § 1132, there is still a substantial ground for difference of opinion on this issue. Therefore, the first two factors for determining whether I may grant a motion for interlocutory appeal are met to my satisfaction. However, in order for me to amend Judge Lefkow's previous order and grant the defendants' motion for interlocutory appeal, I must find that an immediate appeal may materially advance the ultimate termination of the litigation.

Judge Lefkow denied the defendants' motion to certify this issue for interlocutory appeal on September 24, 1996.

One reason for denying the defendants' motion was that "[e]ven assuming that the Seventh Circuit were to reverse the June 13 decision, it is highly likely that the parties would move forward toward a trial of the remaining issues." *See* 9/24/96 Order at 4. Also, Judge Lefkow found that a reversal might shift the burden of trial to a state court, and the "delays attendant with familiarizing yet another judge with the complex facts and legal issues surrounding this matter . . . would be a disservice to the litigants and the general administration of justice." *Id.* at 4-5. For these reasons, Judge Lefkow held that immediate appeal would not materially advance the ultimate termination of the litigation.

Subsequent to Judge Lefkow's September 24, 1996, order the defendants filed a motion for summary judgement on the plaintiffs' state law claims. Judge Lefkow granted the defendants' motion. Therefore, only one claim remains and there is no longer a concern that the parties would likely move forward to trial should the Seventh Circuit reverse Judge Lefkow's rulings. Additionally, the case has now been transferred to me, and so it is inevitable that a new judge will have to familiarize himself or herself with the complex facts and legal issues surrounding this case. Therefore, the two main reasons that Judge Lefkow denied the defendants' motion are no longer relevant, and it seems to me that an immediate appeal may materially advance the ultimate termination of the litigation.

Since I find that there is substantial ground for difference of opinion as to these controlling questions of law and that an immediate appeal from Judge Lefkow's order may materially advance the ultimate termination of this litigation, I shall certify an interlocutory appeal from Judge Lefkow's September 24, 1996, order pursuant to 28 U.S.C. § 1292(b).

IT IS THEREFORE ORDERED that the defendants' renewed motion to amend Judge Lefkow's June 1996 order

to certify the order for interlocutory appeal is granted in accordance with this order.

Dated January 7, 1998

BY THE COURT

s/Warren K. Urbom
United States Senior Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1812

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON,

Plaintiffs-Appellees,

v.

SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 92-C-5883—Joan Humphrey Lefkow, Magistrate Judge.

ARGUED NOVEMBER 30, 1998—DECIDED JULY 6, 1999

Before FLAUM, KANNE, and EVANS, Circuit Judges.

EVANS, Circuit Judge. The Employee Retirement Income Security Act (ERISA) prohibits certain transactions between an employee pension plan and its service providers who are deemed "parties in interest" under the Act. In this case we decide whether ERISA provides a private cause of action against a party in interest for engaging in such prohibited transactions.

In the late 1980's defendant Salomon Brothers Inc. set up financing for two motel chains, Motels of America, Inc. and

Best Inns, Inc., to acquire large blocks of motel properties throughout the country. In four separate transactions the companies initially sold mortgage notes secured by the acquired properties to Salomon, who in turn sold the notes to institutional investors. In exchange for its services Salomon received a participation interest in each group of motel properties which entitled it to a percentage of the "net cash flow" generated by the properties plus a percentage of any appreciation in the properties' value.

During this same time period Salomon also provided broker-dealer services to plaintiff Ameritech Pension Trust (APT), which holds assets for Ameritech Corporation's employee pension plans. Ameritech had appointed National Investment Services of America, Inc. (NISA) to serve as investment manager to APT. In 1987 Salomon offered to sell its participation interests in the Motels of America and Best Inns motel properties to APT as an investment. After extensive negotiations among Salomon, NISA, and Ameritech, APT purchased Salomon's participation interests in the four groups of motel properties for over $20 million. In the early 1990's the nationwide market for hotel and motel real property collapsed, and APT suffered a considerable loss on its investment.

In 1992 APT's newly appointed trustee, Harris Trust and Savings Bank, sued Salomon (and a related company, but we can disregard that detail), seeking to hold it liable for APT's loss on the motel property participation interests. Among the 12 claims in the initial complaint were three ERISA claims relevant here: (1) a claim that Salomon was a fiduciary that had breached its duties to the plan under Title 29 U.S.C. § 1104; (2) a claim that Salomon was a fiduciary that caused the plan to engage in prohibited transactions under § 1106(a); and (3) an alternative claim that Salomon as a nonfiduciary had knowingly participated in a breach of a § 1104 duty by plan fiduciaries.

After the plaintiffs filed suit, we held in another case, based on Supreme Court dicta, that ERISA does not provide a private cause of action against a nonfiduciary for participation in a fiduciary's breach of duty. *See Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (1994); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). This holding effectively knocked out the plaintiffs' third claim. Evidently, the plaintiffs were also fearful that the district court would find that Salomon was not a plan fiduciary, so they amended their second claim to cite Salomon for participating as a nonfiduciary party in interest in a transaction prohibited by § 1106.

Salomon moved for summary judgment on all three ERISA claims, and the plaintiffs moved for summary judgment on their § 1106 claim. As the plaintiffs had feared, Magistrate Judge Joan Humphrey Lefkow, sitting by consent of the parties, first determined that Salomon was not a plan fiduciary and found for Salomon on the first claim. As expected, she also found that the holding in *Continental Casualty* eliminated the third claim against Salomon for nonfiduciary participation in a fiduciary breach. Judge Lefkow denied summary judgment on the newly constituted § 1106 claim, however, finding that ERISA does provide a private cause of action against nonfiduciaries who participate in a prohibited transaction.

After the Supreme Court's decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), Salomon moved for reconsideration or, in the alternative, certification for interlocutory appeal on the sole remaining claim. In *Lockheed* the Supreme Court held that a § 1106 violation occurred only when a fiduciary had caused the plan to enter into the prohibited transaction. The district court declined to reconsider but granted certification for appeal of its denial of summary judgment. We review the denial of a motion for summary judgment *de novo*. *See Hillman v. Resolution Trust Corp.*, 66 F.3d 141, 143 (7th Cir. 1995).

In a part of ERISA titled "Fiduciary Responsibility" the nature of a fiduciary's relationship to a qualified employee benefit plan is spelled out in detail. Title 29 U.S.C. § 1104 defines the duty owed:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

29 U.S.C. § 1104(a)(1). Section 1109 then makes a fiduciary personally liable for breaching this duty and describes the remedies available for a breach. Another part of the Act titled "Administration and Enforcement" provides a specific civil enforcement provision against fiduciaries who breach their duties—the Secretary of Labor, plan beneficiaries, and plan fiduciaries can sue fiduciaries for "appropriate relief under [§ 1109]." 29 U.S.C. § 1132(a)(2). ERISA also broadly allows the Secretary of Labor, plan fiduciaries, and plan beneficiaries to sue "to enjoin any act or practice which violates any provision of this title or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3). This last provision and the phrase "other appropriate equitable relief" has been the cause of much consternation in the courts.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court considered a claim by plan beneficiaries against a nonfiduciary for knowingly participating in a fiduciary's breach of duty. The nonfiduciary defendant had acted as actuary for the Kaiser Steel Retirement Plan. When Kaiser began phasing out its steel operations a large number of employees took early retirement, and the defendant failed

to change the plan's actuarial assumptions to reflect the costs of the unusually large influx of retirees. As a result, Kaiser failed to adequately fund the plan. The plaintiffs brought their action under the "other appropriate equitable relief" clause of § 1132(a)(3). The *Mertens* parties and the lower courts all assumed that § 1132(a)(3) provided a cause of action against nonfiduciaries for knowingly participating in a fiduciary breach, and the only question raised before the Supreme Court was whether money damages could constitute "other appropriate equitable relief." *See Mertens*, 508 U.S. at 251. After extensive ruminations on the nature of equity, a 5-4 majority held that money damages could not be considered equitable relief for the purposes of § 1132(a)(3).

More importantly for our purposes, Justice Scalia, writing for the majority, made clear the Court's doubts that § 1132(a)(3) provides a cause of action against nonfiduciaries for participating in a fiduciary breach because "no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." *Id.* at 254. There had been such a cause of action under the common law of trusts upon which ERISA was largely based. *See id.* Justice Scalia reasoned, however, that because Congress undoubtedly knew about the common law cause of action, it is all the more unlikely that the omission of an explicit cause of action in ERISA was inadvertent. *See id.* The "statute's . . . detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *See id.* (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)). We adopted Justice Scalia's rationale as the law of this circuit in *Continental Casualty*, 33 F.3d at 757.

On appeal, the plaintiffs have wisely abandoned their claim against Salomon for participating in a breach of fiduciary duty under § 1104. Instead, they cite § 1106, which addresses "Transactions between plan and party in interest." In pertinent part, § 1106 provides:

> (a)(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> . . . .
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan[.]

29 U.S.C. § 1106(a). Section 1106 prohibits plan fiduciaries from engaging in these transactions because they create a high potential for conflicts of interest. One example of a party in interest is "a person providing services to such plan." 29 U.S.C. § 1002(14)(B). For the purposes of our review we assume that at all relevant times Salomon was a party in interest vis á vis APT and that § 1106 therefore prohibited the sale of Salomon's motel property participation interests to APT (two points which Salomon reserves the right to dispute should this case go to trial). The plaintiffs argue that Salomon violated the Act by engaging in a transaction prohibited by § 1106. Therefore, the plaintiffs may seek "appropriate equitable relief," including monetary restitution, against Salomon under § 1132(a)(3).

Judge Lefkow agreed and held that § 1106 imposes a duty on nonfiduciary parties in interest to avoid prohibited transactions. This approach has found support in other circuits. *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998); *Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994).

Our analysis begins, as it must, with the statutory language. The plaintiffs and the district court focused on the broad language of § 1132(a)(3) which allows plan fiduciaries like the plaintiffs to seek "other appropriate equitable relief" for any act which violates ERISA. The "act" alleged here is Salomon's participation in a transaction prohibited by § 1106. Therefore, if Salomon is indeed a party in interest and if it did participate in such a transaction, the plaintiffs can seek restitution for the plan's investment losses.

Salomon focuses instead on the language of § 1106 and its statutory context. Salomon points out that § 1106 by its terms only directly governs the conduct of fiduciaries ("a fiduciary . . . shall not cause . . ."), and therefore only a fiduciary can violate § 1106. Salomon's argument is strengthened when we consider the context of § 1106. Title 29 U.S.C. §§ 1101-1114 deal with "Fiduciary Responsibilities." Section 1104 describes the broad fiduciary standard of care that was required at common law, and § 1106 imposes a new statutory fiduciary duty—the duty not to cause the plan to enter into certain prohibited transactions. Section 1109 makes the fiduciary and only the fiduciary liable for breaches of the duties described in the "Fiduciary Responsibility" part of the Act. Finally, Section 1132(a)(2) provides a private right of action for appropriate relief under § 1109.

In *Mertens* Justice Scalia reasoned that because ERISA did not explicitly provide a cause of action against nonfiduciaries for participating in a fiduciary breach under § 1104 there was no such cause of action. The same logic applies to § 1106 because it simply describes another variety of fiduciary breach. Nothing explicitly makes nonfiduciaries liable for participating in a breach of that duty. The plaintiffs place great weight on the fact that § 1106 mentions "parties in interest," but the fact of the matter is that the section, by its plain terms, does not regulate their conduct. Therefore, § 1106 imposes no explicit duty on parties in interest. In *Continental Casualty* we adopted Justice Scalia's position

that where ERISA does not expressly impose a duty, there can be no cause of action. There seems to be no material distinction between that case and this.

In *Continental Casualty* the fiduciaries of a union pension fund obtained a one-year extension of their fiduciary liability insurance policy. The extension cost $750,000 and provided additional coverage of only $1 million. Entering into such a bad deal was a clear breach of fiduciary duty under § 1104. The Department of Labor sought relief for the plan against the fiduciaries under § 1109 and § 1132(a)(2). It also sought restitution from the insurance company which had participated in the fiduciaries' breach. The Labor Department argued that this was appropriate equitable relief under § 1132(a)(3). Relying on *Mertens*, we denied the claim against the insurance company because neither § 1104 nor § 1109 explicitly imposed liability on nonfiduciaries. Section 1132(a)(3) as a remedial statute only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act.

The same logic applies to this case. Section 1106 falls under the "Fiduciary Responsibility" part of the Act, and § 1109 makes fiduciaries liable for violating § 1106. The mere fact that § 1106 mentions "parties in interest" when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction.

The only viable distinction the plaintiffs raise between the position of participating parties in interest under § 1104 and participating parties in interest under § 1106 is that one of the Act's remedial provisions imposes civil penalties on parties in interest when they participate in a transaction prohibited by § 1106: "In the case of a transaction prohibited by section 406 [29 U.S.C. § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary [of Labor] may assess a civil penalty against such party in interest." 29

U.S.C. § 1132(i). The fact that Congress saw fit to allow the Labor Department to impose such a penalty, however, only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking. Section 1132(i) allows the Labor Department to impose a civil penalty of up to 5 percent of the value of the transaction if the party in interest is willing to "correct" the transaction in a manner prescribed by the Department. If the party in interest refuses to correct the transaction, the penalty can be increased to 100 percent of the transaction amount. The Supreme Court in *Mertens* determined that Congress did not intend to impose civil liability on parties in interest for participating in a breach of fiduciary duty because ERISA does not contain an explicit statement of nonfiduciary participation liability. Similarly, nothing in ERISA makes nonfiduciary parties in interest civilly liable to the plan for participating in a § 1106 transaction. Section 1132(i) does provide a penalty against such parties in interest, but that penalty is imposed solely at the discretion of the Labor Department. If Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly as it did in the case of fiduciaries and in the case of cofiduciaries. *See* 29 U.S.C. § 1105.

The plaintiffs cite language in *Mertens* which they believe supports their position that parties in interest are liable for participation in prohibited transactions. In *Mertens* Justice Scalia suggested that "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [§ 1106], and pay related civil penalties [under § 1132(i)] . . . and (assuming nonfiduciaries can be sued under [§ 1132(a)(3)]) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees." *Mertens*, 508 U.S. 248, 262. This language, however, does not get the plaintiffs as far as they would like. First, the statement that professional

service providers like Salomon must disgorge assets and profits gained from a § 1106 transaction is unremarkable. As discussed above, § 1132(i) forces parties in interest to correct such transactions at peril of a Labor Department penalty.

Second, Justice Scalia's remark that "assuming nonfiduciaries can be sued under [§ 1132(a)(3)]" must be understood in the context of the unique posture of the case the Supreme Court had before it. The parties and lower courts in *Mertens* had all assumed that § 1132(a)(3) provided relief against nonfiduciaries for participation in a fiduciary breach. Therefore, the Supreme Court was asked to determine only whether damages could be considered "appropriate equitable relief." A majority of the Court, however, expresses strong doubts as to whether there even was a cause of action under § 1132(a)(3) against nonfiduciaries. *See Mertens*, 508 U.S. at 254-55. The Court then proceeded to decide the issue of whether damages could be equitable, technically leaving open the issue of whether § 1132(a)(3) provided a cause of action against nonfiduciaries. Thus, the parenthetical phrase "assuming nonfiduciaries can be sued under [§ 1132(a)(3)]" was stating a big assumption—an assumption Justice Scalia had previously made clear that he and a majority of the Court were unwilling to make. Justice Scalia's reasoning is now the law of this circuit, and the "assuming" language can no longer support the plaintiffs' reading of the statute.

Both parties also cite the more recent Supreme Court decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), to support their respective positions. Salomon cites the case for the proposition that only fiduciaries can be held liable under § 1106. In *Lockheed* the plaintiff beneficiary sued his employer, the plan sponsor, for engaging in a transaction prohibited by § 1106. The Ninth Circuit held that the plan sponsor in this case was not a fiduciary but was still liable as a party in interest under § 1106. The Supreme Court reversed. Justice Thomas, writing for a unanimous Court, held that proof that a fiduciary caused the plan to enter into

the prohibited transaction was a necessary predicate to § 1106 liability. *See id.* at 891. Once the Court had determined that the defendant sponsor was not a fiduciary, there was no other potential fiduciary to cause the transaction. However, Justice Thomas also seemed to leave open the possibility that a nonfiduciary party in interest could be held liable for a prohibited transaction if a fiduciary caused the plan to enter into the transaction:

> The Court of Appeals thus was not necessarily wrong in saying that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA"; but the only transactions rendered impermissible by [§ 1106] are transactions caused by fiduciaries.

See id. at 889 n.3. The plaintiffs seize on this rationale to support their argument that nonfiduciaries are liable under § 1106, but the opinion really provides no guidance one way or the other. "Not necessarily wrong" does not mean "right." Furthermore, Justice Thomas went out of his way to point out that the passages from *Mertens* that the Ninth Circuit relied on in finding that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA" were dicta. *See id.* At most, the "not necessarily wrong" statement makes it clear that in *Lockheed* the Court was once again not addressing the issue of party-in-interest liability under § 1106. Such liability was still an open question after *Lockheed* as far as the Supreme Court was concerned.

The plaintiffs also find support for their reading of § 1106 in ERISA's legislative history. A Congressional Conference Committee Report suggests that § 1106 would prohibit "plan fiduciaries and parties in interest" from engaging in the listed transactions, implying that both parties to the transaction would be liable. H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5087. But Salomon's analysis of the legislative history is more

convincing. The Senate and the House of Representatives both passed versions of ERISA. The House bill did not explicitly impose liability on nonfiduciaries; the Senate bill did:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay the fund any profits realized by him from such transaction.

H.R. 2, 93rd Cong., 2d Sess. § 511 (adding § 15(i)), 693 (as passed by the Senate on Mar. 4, 1974) (not enacted), reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3599, 3780 (1976). The Conference Committee staff charged with reconciling the House and Senate versions specifically recommended dropping the party in interest liability provision. Summary of Differences Between the Senate Version and the House Version of H.R. 2—To Provide for Pension Reform, committee prints prepared for the use of the Senate and House conferees on H.R. 2, Committee Print No. 1, Pt. 3, p. 9, 93rd Cong. Sess. (1974), *id.* at 5259. And Congress did so when it passed the final bill into law. While we hesitate to give too much weight to legislative history, this record suggests that Congress specifically considered imposing civil liability on parties in interest for participating in impermissible transactions, then elected not to do so.

Whether there is a private cause of action against nonfiduciary parties in interest under § 1106 is a difficult issue. As we have noted, at least three other circuits have found such a cause of action. Ultimately, the dicta in *Mertens* adopted by this court in *Continental Casualty* provides the most guidance. Applying Justice Scalia's rationale to § 1106, we do not think it imposes liability on nonfiduciary parties in inter-

est any more than § 1104 does. Like § 1104, § 1106 comes under the heading "Fiduciary Responsibility."

The plaintiffs argue that because it is entitled "Prohibited Transactions" § 1106 regulates the conduct of all parties to the transaction. The prohibitory language of the section itself is clear, however: "*fiduciaries* shall not . . . ." Causing a qualified plan to engage in one of these transactions is simply another species of fiduciary breach. A nonfiduciary cannot violate § 1106 and therefore cannot be liable under § 1132(a)(3) for participating in a § 1106 transaction. Section 1132(i) provides the only express penalty against nonfiduciary parties in interest who participate in a fiduciary's breach of his or her responsibility under § 1106. The Supreme Court has repeatedly stated its reluctance to infer ERISA causes of action where the statute does not expressly provide for them, and we decline to do so here.

With all due respect to the circuits[1] who have considered this issue, we find no convincing reason to distinguish § 1106 from § 1104 for the purposes of nonfiduciary liability. The decision of the district court is therefore reversed and summary judgment is granted to Salomon Brothers.

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[1] Because this opinion creates a circuit split, it has been circulated among all judges of the court in regular active service as required by Seventh Circuit Rule 40(e). Judge Coffey did not participate in the circulation due to a conflict. All other judges voted not to rehear the case en banc except Judge Ripple who voted to grant rehearing en banc.